(22,398.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 777.

WALTER B. LAWRENCE, SUING ON BEHALF OF HIMSELF AND OTHER STOCKHOLDERS OF THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY, SIMILARLY SITUATED, WHO MAY COME IN AND CONTRIBUTE TO THE EXPENSES OF THE ACTION, APPELLANT,

vs.

THE SOUTHERN PACIFIC COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 21, 1910.

1 New York Supreme Court, County of Queens.

WALTER B. LAWRENCE, Suing on Behalf of Himself and Other Stockholders of the Houston and Texas Central Railway Company Similarly Situated Who May Come in and Contribute to the Expenses of this Action, Plaintiff,

against

SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL TRUST Company of New York, Farmers' Loan and Trust Company, Metropolitan Trust Company of the City of New York, The Houston and Texas Central Railroad Company, and Houston and Texas Central Railway Company, Defendants.

Trial Desired in the County of Queens.

To the above named Defendants:

2 You are hereby summoned to answer the complaint in this action, and to serve a copy of your Answer on the Plaintiff's Attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, New York, February 18th, 1908.

DITTENHOEFER, GERBER & JAMES,
Plaintiff's Attorneys.

Office & Post Office Address, No. 96 Broadway, Borough of Manhattan, New York City.

New York Supreme Court, County of Queens.

WALTER B. LAWRENCE, Suing on Behalf of Himself and Other Stockholders of the Houston and Texas Central Railway Company Similarly Situated Who May Come in and Contribute to the Expenses of this Action, Plaintiff,

against

SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL Trust Company of New York, Farmers' Loan and Trust Company, Metropolitan Trust Company of the City of New York,

3 The Houston and Texas Central Railroad Company, and Houston and Texas Central Railway Company, Defendants.

Trial Desired in Queens County.

The plaintiff, complaining of the defendants, alleges as follows, on information and belief:

First. At all the times hereinafter mentioned, the defendant Southern Pacific Company was and is a corporation organized and

existing under and by virtue of the laws of the State of Kentucky, and the defendants Central Trust Company of New York, Farmers' Loan and Trust Company, and Metropolitan Trust Company of the City of New York were and now are each corporations organized and existing under and by virtue of the Laws of the State of New York, and the defendant The Houston and Texas Central Railroad Company was and is a corporation organized and existing under and by virtue of the Laws of the State of Texas, and the defendant, The Houston and Texas Central Railway Company, was a corporation organized and existing under and by virtue of the laws of the State of Texas.

Second. The Houston & Texas Central Railway Company was at the times hereinafter mentioned in possession and engaged in the operation of various lines of railway in the State of Texas. The said Railway Company had issued and outstanding capital stock to the extent of 77,269 shares of the par value of $7,726,900, all of which was fully paid and non-assessable.

Third. The plaintiff resides in the County of Queens
4 and is and at the times of the transactions and grievances of which he complains was a resident of the State of New York and a stockholder of the said Railway Company, and during all of said times he was and is the owner and holder of one hundred shares of said stock of said Company of the par value of $10,000. Said stock had been purchased by the plaintiff at a high price, and the stock of the said Railway Company had been dealt in on the New York Stock Exchange for a number of years prior to the year 1888.

Fourth. The plaintiff alleges that the said Railway Company had received from the State of Texas large grants of land for the purpose of aiding in the building, construction and equipment of the lines of the said Railway. At the time of the Reorganization Agreement hereinafter mentioned the said Company owned and held 4,500,000 acres of land, received as aforesaid from the State of Texas, which land was then and there of the value of about $15,000,000.

Fifth. Before the date of the Reorganization Agreement hereinafter referred to the said Railway Company had executed and delivered seven different mortgages to various Trustees to secure seven different issues of Bonds. Under each of said mortgages, except one, Bonds secured respectively by the said mortgages had been issued and were outstanding. Under one of said mortgages, known as the Income and Indemnity Mortgage, all of the Bonds which had been issued had been called in, except one Bond of Five Hundred Dollars, which is, and was, lost.

Sixth. The defendant Southern Pacific Company acquired
5 and, at all the times hereinafter mentioned, held control of the majority of the stock of the said Railway Company by reason of the following facts: In the years 1883 and 1884 Morgan's Louisiana and Texas Railroad and Steamship Company, a Louisiana corporation owned more than a majority of the outstanding capital stock of the said Railway Company, owning stock of the par value of about $4,000,000 out of a total issue of $7,726,900. In the early part of the year 1883, the Southern Development Com-

pany, a California corporation, acquired and thereafter held more than a majority of the capital stock of the said Morgan's Louisiana and Texas Railroad and Steamship Company. In 1885 the defendant Southern Pacific Company acquired from the Southern Development Company, and thereafter held, more than a majority of the capital stock of Morgan's Louisiana and Texas Railroad and Steamship Company. From and after the year 1885, when the defendant Southern Pacific Company so acquired control of more than a majority of the stock of the said Morgan's Louisiana and Texas Railroad and Steamship Company, the said defendant Southern Pacific Company by means of said control, selected and elected Officers and Directors of the said Railway Company, and said Southern Pacific Company controlled and dictated the policy of the said Railway Company and the action of its officers, attorneys, and agents.

Seventh. In or after the year 1885 the said Railway Company became involved in litigations with its secured and unsecured creditors. On February 11, 1885, the Trustees of one of the mortgages upon part of the property of the Railway Company brought
6 a suit against the said Railway Company, but not a suit to foreclose the said mortgage. On the same day the same individuals, as Trustees of another of the said mortgages upon part of the property of the said Railway Company, commenced another suit against the said Railway Company, but not a suit to foreclose said mortgage. Each of said suits was commenced by Bill in Equity exhibited in the United States Circuit Court for the Eastern District of Texas. In said suits the Trustees under said mortgages complained that the said Railway Company had failed to make provisions for the sinking funds required respectively by said mortgages to be set aside and had violated other terms and agreements contained in the said mortgages. The said Trustees further alleged that the said Railway Company was diverting to other creditors funds and the proceeds of lands which should be applicable to the mortgages whereof they were Trustees, and alleged other grievances against the said Railway Company. To said two Bills the Railway Company, on June 22, 1885, interposed answers, admitting some of the grievances complained of and denying others and denying the right of complainants to any relief; and the said two suits were placed upon the docket of the said United States Circuit Court and numbered respectively 183 and 184. No further proceedings were taken in said suits for a long period of time thereafter.

Eighth. On February 16, 1885, the said Southern Development Company, the majority of the stock of which at the time was owned and controlled by the defendant Southern Pacific Company, exhibited a Bill in the said United States Circuit Court for the Eastern District of Texas against the said Railway Company. In said
7 Bill of Complaint alleged the existence of various mortgages upon various parts of the property of the said Railway Company, and alleged the amount of Bonds outstanding under each of said mortgages; it alleged a floating indebtedness, due partly to itself, and claimed that said floating indebtedness was entitled to an equity

superior to that of the mortgage bondholders. The Bill alleged various other facts and circumstances; and six days after the same was filed, upon the consent of the said Railway Company, which, together with the Complainant, the Southern Development Company, was controlled by the defendant Southern Pacific Company, the Court in said suit appointed two individuals Receivers of the said Railway Company and its property.

Ninth. On April 20, 1885, an amended Bill was filed by the said Southern Development Company alleging certain other and further alleged grievances beyond those set out in its original Bill.

Tenth. On July 7, 1885, the said Railway Company filed its answer to the said suit of the said Southern Development Company, in which answer it admitted the necessity for the appointment of Receivers.

Eleventh. On March 18, 1885, The Farmers' Loan & Trust Company, as Trustee of one of the seven mortgages covering the property of the said Railway Company, exhibited its Bill against the said Railway Company in the said United States Circuit Court for the Eastern District of Texas. In said Bill of Complaint the Complainant alleged violation by the said Railway Company of
8 various terms and stipulations contained in the said mortgage whereof the Complainant was Trustee, and alleged default in the payment of certain coupons due upon the Bonds secured by various mortgages. It prayed for a decree requiring an accounting of the sales of certain lands covered by the said mortgage and for an injunction and other relief. Neither this Bill of Complaint, nor any of the Bills filed theretofore by the Trustees of any of the mortgages, contained any allegation that the principal secured by the said mortgages had become due; nor was any foreclosure asked for or demanded in any of said bills of Complaint.

Twelfth. On June 22, 1885, the said Railway Company filed its answer to the said Bill of Complaint of the said Farmers' Loan & Trust Company, denying some of said allegations and admitting others and denying the right of the complainant to any relief, and the said suit was entered on the docket of the said United States Circuit Court for the Eastern District of Texas at No. 188. The said suit remained on the said docket at issue, and no active steps were taken to press the same to trial.

Thirteenth. On October 5, 1885, the Trustees of certain of the mortgages covering the property of the said Railway Company demurred to the Bill of Complaint of the Southern Development Company, which demurrer was thereafter, and on May 27, 1886, sustained and the said Bill of the Southern Development Company dismissed.

Fourteenth. On January 21, 1886, the Trustees of two
9 mortgages covering different portions of the property of the said Railway Company exhibited Bills in Equity in the said United States Circuit Court for the Eastern District of Texas demanding the foreclosure of the said mortgages. The said Bills alleged default in the payment of interest due under said mortgages respectively and claimed that the said Railway Company by its acts

had prevented the said Trustees from taking possession of and operating the said portion of said Railway, as they were entitled to do, in case of failure by the said Railway Company to pay interest. The said Bills alleged other grievances, and alleged the insolvency of the Railway Company, and demanded that the property of the said Railway Company should be sold to prevent an irreparable injury.

Fifteenth. To said Bills respectively the Railway Company interposed answers, denying some of the allegations of the said Bills, and admitting others. In said answers the said Railway Company set up the fact that the principal sum of the Bonds secured by the said mortgage had not become due and demandable by virtue of the matters and things alleged in the said Bill of Complaint. The said answers further pleaded the Statute of Limitations, and pleaded ratification by the said Trustees of certain of the wrongs complained of in the said Bills of Complaint. Said answers further averred that the said mortgages under which the said property was sought to be foreclosed covered respectively only part of its system, and that its rolling stock belonged to its system as a whole and could not be apportioned among the different divisions. Said Railway interposed various other good and apparently valid de-
10 fenses to the said suits to foreclose respectively; and the said suits were placed upon the docket of the said United States Circuit Court for the Eastern District of Texas, and known as suits No. 198 and No. 199. No effort was made to overcome the defenses interposed by the said Railway Company to the said suits to foreclose, and no active steps were taken to bring the same to a hearing.

Sixteenth. On April 24, 1886, The Farmers' Loan & Trust Company, as Trustee of one of the mortgages covering property of the said Railway Company, exhibited a Bill of Complaint in said United States Circuit Court for the Eastern District of Texas, averring various defaults and breaches by the Railway Company of its contracts and obligations under the terms of the said mortgage. In said Bill of Complaint the said Complainant set up certain claims and sought certain relief against other creditors and against the Trustees of other mortgages who had theretofore filed Bills in the said Court. The said Complainant demanded relief that the property of the said Railway Company be sold in satisfaction of its claim.

Seventeenth. Neither the said mortgage, whereof the said The Farmers' Loan & Trust Company was Trustee, nor any of the other mortgages heretofore referred to, permitted a foreclosure or sale of the property for non-payment of interest, nor by the terms of said mortgages, or any of them, was the principal debt made due thereunder by reason of failure to pay interest nor had any of the said mortgages matured. On the contrary, each and all of the said mortgages provided that in the event of non-payment of in-
11 terest, the Trustees of the said mortgages should be entitled to enter into and take possession of the portion of the Railway covered by the respective mortgages and operate the same until the said arrears of interest were extinguished.

Eighteenth. On September 3d, and on September 9th, 1886, re-

spectively, the Railway Company filed answers to the Bill of Complaint of the said Farmers' Loan & Trust Company to foreclose the mortgage whereof it was Trustee, in which answers the said Railway Company denied certain allegations of the said Bill, and admitted others, and denied the right of said complainant to any relief, and put at issue the suit of the said The Farmers' Loan & Trust Company.

Nineteenth. On May 26th 1886, all of said suits affecting the property of the said Railway Company were consolidated and numbered Cause No. 198 upon the docket of said Court. The Receivers appointed by consent in the suit of the Southern Development Company were discharged on May 27th, 1886, and the property placed in the hands of Receivers appointed in the consolidated cause, No. 198.

Twentieth. In said consolidated cause No. 198, various pleadings had been and were filed by parties thereto, raising questions between different classes of mortgage creditors and the said Railway Company and questions between various creditors of the said Railway Company as among themselves, and questions affecting judgment creditors of the said Railway Company, and questions as to whether or not the property of the said Railway
12 Company could be sold in parcels or as an entirety, and questions as to what disposition could be made of the rolling stock of the Railway Company, if the Railway could be sold in parcels, and questions as to whether or not the said Railway Company was acting in collusion with certain of its creditors as against others. The defenses to each and all of the suits interposed by the said Railway Company were never overcome in said litigations. Said defenses were valid, legal defenses to the said suits and each and all of them, and could not be overcome save by the consent of said Railway Company. The Railway Company had interposed the defense, among others, that none of the mortgages which the respective Trustees thereof sought to foreclose could be foreclosed until there occured a default in the payment of the principal of the said Bonds secured thereby; and no default in the payment of the principal of said Bonds had occured. The defenses to the suits of different creditors interposed by the said Railway Company were good, legal and valid defenses to the suits brought by the different Trustees and different classes of creditors, and the different classes of creditors were prevented from proceeding by said defenses, and also by the controversies which had arisen and were set up in the pleadings in the said cause between the creditors themselves. No progress was made in bringing said cause on for a hearing. By interposing the answers and defenses hereinbefore referred to, the said Railway Company, which, throughout all of said period was controlled by the defendant Southern Pacific Company, as aforesaid, had prevented and was preventing the foreclosure of any mortgage or lien upon its property.

13 Twenty-first. Thereafter negotiations were entered into between the defendant Southern Pacific Company and the holders of Bonds under six of the seven mortgages which had been

placed upon the property of the said Railway Company, which resulted finally in the formation and execution in the City and State of New York of a Reorganization Agreement, a copy of which is hereto annexed as a part of this complaint and marked "Exhibit A." The said Agreement was executed by the Southern Pacific Company, by the Central Trust Company of New York and by a large number of holders of Bonds under each of the said six mortgages upon property of the said Railway Company referred to in said Agreement.

Twenty-second. By the terms of said Agreement the Southern Pacific Company, which controlled, as aforesaid, a majority of stock of the said Railway Company, was permitted and allowed to take stock of the proposed new and reorganized Company upon terms different from and better than the terms proposed by said agreement to be offered to the minority stockholders of the said Railway Company. By the said Agreement the said Southern Pacific Company had stipulated that all existing mortgages upon the property of the said Railway Company should be foreclosed, and had given to said Central Trust Company of New York the right to declare due the principal of mortgages upon the property of the said Railway Company. Said stipulations could not be carried out by the said Southern Pacific Company, except through the control which the said Company held of a majority of stock of the said Railway
14 Company, and control of the officers and attorneys for said Railway Company; and said stipulations were thereafter carried out by the said Southern Pacific Company through and by means of the said control by the Southern Pacific Company of a majority of stock of the said Railway Company and control of the officers and attorneys of said Railway Company.

Twenty-third. The said Reorganization Agreement was thereafter carried out according to its terms, except, as hereinafter stated, it was not carried out in its provisions concerning the lands owned by said Railway Company. On April 30, May 1, May 2, and May 3, 1888, various new pleadings and answers were filed in the United States Circuit Court for the Eastern District of Texas, demanding the foreclosure and sale of all of the mortgages upon the property of the said Railway Company, to which pleadings the Railway Company interposed no defense; and on May 4, 1888, a decree of foreclosure was filed by which it was adjudged and decreed that the principal and interest of each and all of the said mortgages was due and payable, and that the whole property of the Railway Company should be sold in default of payment of the said mortgage indebtedness, which was fixed by the said decree at over $19,000,000.

Twenty-fourth. The said decree was entered by consent of said Railway Company and all other parties to said suits, and had, prior to its presentation to the Court, been prepared and agreed to by the attorneys representing the parties to the said plan of reorganization, and especially by the attorney for the Southern Pacific Company. The good and valid defenses of the Railway Company to the
15 foreclosure of the said mortgages were not insisted upon, and were withdrawn because the said Southern Pacific Company,

by reason of its control of the said Railway Company, was able to and did procure the assent of the said Railway Company, to the carrying out of the said plan of reorganization. The principal of the said mortgage bonds was not in fact due, and was found due only because the Southern Pacific Company had by the said Agreement given the Central Trust Company the right to declare the said principal due. The said Southern Pacific Company was able to and did procure the carrying out of the said Reorganization Agreement and the withdrawal of all defenses to said suits theretofore interposed by the Railway Company.

Twenty-fifth. A foreclosure sale was thereafter held pursuant to the said decree of May 4, 1888, at which sale the property was bid in by Frederic P. Olcott, President of the Central Trust Company, acting for said Trust Company, and acting in pursuance of the said Reorganization Agreement. No part of the money or bonds paid, delivered or surrendered at the said sale, for the property, bid in by the said Olcott, belonged to him, but said money and bonds were furnished under and pursuant to the said Reorganization Agreement. A new railroad corporation was organized pursuant to the terms of the Reorganization Agreement which was known as the Houston and Texas Central Railroad Company. To said new Company the said Olcott transferred the lines of railroad, rolling stock, etc., purchased at said foreclosure sale. The said Railroad Company thereupon executed Bonds secured by three mortgages prepared, executed and delivered in accordance with the Reorganization Agreement which Bonds were delivered to the Central Trust Company and by it distributed among the bondholders who had deposited their Bonds with said Trust Company under the Reorganization Agreement. All of the bondholders of the old Railway Company accepted said new bonds of the new Railroad Company, accordingly to the provisions of the Reorganization Agreement.

Twenty-sixth. At the said foreclosure sale the said Olcott also pursuant to said reorganization agreement bought in all the lands owned and held by the said Railway Company, which said lands he did not transfer to the new Railroad Company, but which said lands he conveyed by three Trust Indentures; one to the defendant Central Trust Company of New York, which was Trustee of the first mortgage provided for under the said Reorganization Agreement; one to the Farmers' Loan & Trust Company, which was Trustee of the second mortgage provided for in the Reorganization Agreement, and one to the Metropolitan Trust Company, which was Trustee of the third or general mortgage provided for under the Reorganization Agreement. By the terms of said Trust Indentures the said lands are to be sold for the benefit of holders of new Bonds under the said three new mortgages of the reorganized railroad company, and no provision is made as to any disposition of the surplus, if any, after the satisfaction of all of the said bonds and the discharge of all of the said mortgages; but the said lands, after a sufficient amount thereof shall have been sold to satisfy and discharge the Bonds issued under the said three new mortgages, are to revert to the said Frederic P. Olcott and his heirs. Since the execution of

said Trust Indentures there have been sales of large quanities
17 of the said lands from which more than $4,000,000 has been realized, which moneys have been applied to retire Bonds issued under the three new mortgages of the reorganization railroad company.

Twenty-seventh. The Central Trust Company of New York, as Agent under the said Reorganization Agreement, thereafter required the plaintiff and each minority stockholder of the Houston and Texas Central Railway Company who wished to receive the benefits of said Reorganization Agreement to pay a prohibitive assessment, amounting to over Seventy Dollars per share for each share of stock held by the plaintiff and other minority stockholders; and no minority stockholder paid such assessment, and all of the $10,000,000 (par value) of stock of the new reorganized Railroad Company was taken over by the defendant Southern Pacific Company on terms far more favorable to said Southern Pacific Company than the said terms offered to the plaintiff and other minority stockholders, which said stock was delivered to and received by the said Southern Pacific Company in the City and State of New York. The Southern Pacific Company now holds and claims to own the whole of the stock of the reorganized Railroad Company. Said stock was and is now of great value. During the time since the said Southern Pacific Company acquired the said stock it has made great profit by its ownership and control of said stock in the way of dividends and otherwise.

Twenty-eighth. In order to acquire said stock under the Reorganization Agreement the said Southern Pacific Company undertook
to guarantee certain obligations of the reorganized Railroad
18 Company as appears from said Reorganization Agreement; but it has never been called upon to pay any sum on account of its said guarantees. The Southern Pacific Company was also required under said Reorganization Agreement to pay certain expenses and charges of reorganization, the exact amount of which is not known to the plaintiff.

Twenty-ninth. The defendant Southern Pacific Railroad Company acquired the said $10,000,000 par value of stock of the reorganized Railroad Company through and by means of its ownership and control of a majority of stock of the Houston and Texas Central Railway Company and through its control of the directors, officers and attorneys of said Railway Company; and through and by means of its power to cause the said Railway Company to withdraw defenses which it had interposed to the suits against the Railway Company, which defenses were interposed for the benefit of said Railway Company and all of the stockholders thereof; and through the consent which the said Southern Pacific Company gave, and which it caused the said Railway Company to give, to the entry of a decree declaring due the principal of all of the mortgages upon property of the said Railway Company. The acquisition of the said $10,000,000 par value of stock of the new Railroad Company was obtained by the said Southern Pacific Company in consideration of the performance by the said Railway Company of corporate acts and the

withdrawal by the said Railway Company of defenses which had been interposed for the benefit of the said Railway Company and all its stockholders. The payment to the Southern Pacific Com-
19 pany of the said $10,000,000 par value of stock of the new Railroad Company was a part of and in consideration of a composition between said Railway Company and its mortgage creditors, set out and described in said Reorganization Agreement. The mortgage creditors permitted and allowed the said Southern Pacific Company to take the whole capital stock of the new company in consideration of the withdrawal by the old Railway Company of defenses which prevented the foreclosure of mortgages. And the said Southern Pacific Company received the Ten Million Dollars of stock and obtained for itself better terms in the distribution of said stock than was given to the minority stockholders of the said Railway Company because of and by reason of its control of a majority of the stock of the said Railway Company, and of the officers, directors and attorneys of said Railway Company. When the said Southern Pacific Company received and accepted the said Ten Million Dollars of stock, it received the same charged and impressed with a trust for the benefit of the plaintiff and all other minority stockholders, and the said Southern Pacific Company now holds the said stock as such Trustee, and not in its own right.

Thirtieth. The defendant Central Trust Company has no beneficial interest in the lands conveyed to said Company by the defendant Frederic P. Olcott, but holds the same solely as Trustee under the terms of the Trust Indenture made to the said Central Trust Company by the said Frederic P. Olcott, by the terms of which the lands so conveyed are to be sold from time to time and the proceeds of the said sales to be applied, in accordance with the terms
20 of said Trust Indenture, to paying off and retiring First Mortgage Bonds of the reorganized Railroad Company, and after all of said Bonds shall have been retired and paid off, the surplus of the said lands, if any, is to revert to the defendant Frederic P. Olcott. Said provision as to the reversion to the defendant Olcott of the remaining surplus of said lands is in violation of the terms of said Reorganization Agreement, and the said reorganized Railroad Company is and should be the beneficial owner of the surplus of said lands after the payment and satisfaction of the said First Mortgage Bonds.

Thirty-first. The defendant, The Farmers' Loan & Trust Company has no beneficial interest in the lands conveyed to the said Company by the defendant Frederic P. Olcott, but holds the same solely as Trustee under the terms of the Trust Indenture made to the said The Farmers' Loan & Trust Company by the said Frederic P. Olcott, by the terms of which the lands so conveyed are to be sold from time to time and the proceeds of the said sales to be applied, in accordance with the terms of said Trust Indenture, to paying off and retiring Second Mortgage Bonds of the reorganized Railroad Company, and after all of said Bonds shall have been retired and paid off the surplus of the said lands, if any, is to revert to the defendant Frederic P. Olcott. Said provision as to the reversion to the

defendant Olcott of the remaining surplus of said lands is in violation of the terms of the said Reorganization Agreement, and the said reorganized Railroad Company is and should be the beneficial owner of the surplus of said lands after the payment and satisfaction of said Second Mortgage Bonds.

21 Thirty-second. The defendant Metropolitan Trust Company has no beneficial interest in the lands conveyed to the said Company by the defendant Frederic P. Olcott, but holds the same solely as Trustee under the terms of the Trust Indenture made to the said Metropolitan Trust Company by the said Frederic P. Olcott, by the terms of which the lands so conveyed are to be sold from time to time and the proceeds of the said sales to be applied, in accordance with the terms of said Trust Indenture, to paying off and retiring Third or General Mortgage Bonds of the reorganized Railroad Company, and after all of said Bonds shall have been retired and paid off, the surplus of the said lands, if any, is to revert to the defendant Frederic P. Olcott. Said provision as to the reversion to the defendant Olcott of the remaining surplus of said lands is in violation of the terms of said Reorganization Agreement, and the said reorganized Railroad Company is and should be the beneficial owner of the surplus of said lands after the payment and satisfaction of the said Third or General Mortgage Bonds.

Thirty-third. Plaintiff further alleges that he and other stockholders similarly situated, did, prior to the commencement of this action, request the directors of the Houston and Texas Central Railway Company, to commence an action for an accounting. That the said directors, failed, neglected and declined to commence any action or proceeding whatever against the Southern Pacific Company, Olcott or any of the defendants herein. That the directors of the Houston and Texas Central Railway Company were selected and elected by the Southern Pacific Company through its control

22 of the majority of the stock of the said Houston and Texas Central Railway Company, controlled by it as hereinbefore set forth, and their interests are inimical to those of the plaintiff and the minority stockholders similarly situated of said Railroad Company. That the said directors assert and contend and in prior litigations have uniformly and persistently contended that the said Southern Pacific Company and the said Frederic P. Olcott are not required to account to the plaintiff, or any other minority stockholder of the said Railway Company, or to the said Railway Company, for the stock, lands, and property claimed by them and are justified in their conduct and actions in respect to said stock, lands and property and that the minority stockholders have no right or claim to or interest in any portion of the stock, lands or property acquired by the said Southern Pacific Company or Frederic P. Olcott, nor a right to an accounting by them or either of them, or to any of the relief sought in this action, and have allied themselves with the said Southern Pacific Company and Frederic P. Olcott against the minority stockholders, and any further demand or request upon the said directors to commence an action for the relief sought in this suit, would be futile and hopeless.

Thirty-fourth. That the minority stockholders of the said Houston and Texas Central Railway Company, situated similarly to this plaintiff, are very numerous, exceeding one hundred in number, and that the names and places of residence of all of the said stockholders are unknown to plaintiff, and it will be impracticable to bring them all before the Court. That this action is brought on behalf of the plaintiff for his own benefit, and of all of the
23 other stockholders of the said Houston and Texas Central Railway Company similarly situated who may come in and contribute to the expenses of this action, and receive the benefits thereof.

Wherefore, the plaintiff demands judgment:

First. That it be adjudged and decreed that the defendant Southern Pacific Company acquired and holds the said $10,000,000 par value of capital stock of the Houston and Texas Central Railroad Company, and all profits and earnings which it has received or may receive from holding said stock as Trustee for the plaintiff and other minority stockholders of the Houston and Texas Central Railway Company, who may come in and contribute to the expenses of this action, in accordance as the respective rights of the said defendant Southern Pacific Company and the said minority stockholders may be adjusted by the Court.

Second. That an accounting be had, and that the Southern Pacific Company be required to account for all stocks, moneys, property, benefits and advantages which it received, acquired, became or is entitled to pursuant — and in furtherance of or because of the execution of the Reorganization Agreement hereinbefore referred to, and that on such accounting the said Southern Pacific Company be credited with such moneys as it may have paid on account of guarantees and expenses of carrying out the said reorganization and be given all other proper credits; and that it be decreed
24 to hold the balance in trust, to be ratably distributed among each and every the shareholders of the Houston and Texas Central Railway Company in proportion to the holdings of such shareholders in said Railway Company.

Third. That it be adjudged that neither the defendant Central Trust Company, nor the defendant Frederic P. Olcott, has any beneficial interest or ownership in the lands conveyed to the said Central Trust Company by the said Frederic P. Olcott, and that it be further adjudged, after the fulfillment and completion of all of the purposes of the said Trust Indenture from the said Olcott to the said Central Trust Company, that the surplus of the said lands, if any, be transferred, assigned and delivered by proper deed of conveyance to the defendant Houston and Texas Central Railroad Company.

Fourth. That it be adjudged that neither the defendant The Farmers' Loan & Trust Company, nor the defendant Frederic P. Olcott, has any beneficial interest or ownership in the lands conveyed to the said The Farmers' Loan & Trust Company by the said Frederic P. Olcott, and that it be further adjudged, after the fulfillment and completion of all of the purposes of the said Trust

Indenture from the said Olcott to the said The Farmers' Loan & Trust Company, that the surplus of the said lands, if any, be transferred, assigned and delivered by proper deed of conveyance to the defendant Houston and Texas Central Railway Company.

Fifth. That it be adjudged that neither the defendant
25 Metropolitan Trust Company, nor the defendant Frederic P. Olcott, has any beneficial interest or ownership in the lands conveyed to the said Metropolitan Trust Company by the said Frederic P. Olcott, and that it be further adjudged, after the fulfillment and completion of all of the purposes of the said Trust Indenture from the said Olcott to the said Metropolitan Trust Company, that the surplus of the said lands, if any, be transferred, assigned and delivered by proper deed of conveyance to the defendant Houston and Texas Central Railway Company.

Sixth. That an injunction issue pendente lite and thereafter perpetually, *enjoying* and restraining the Southern Pacific Company and Frederic P. Olcott, and all other persons acting for, under or through them, or either of them, from disposing of, encumbering, pledging, hypothecating, mortgaging, transferring, conveying or assigning any of the capital stock of the Houston and Texas Central Railroad Company or certificates thereof or property, real or personal, acquired by them or either of them under, pursuant to, in furtherance, or performance of the Reorganization Agreement, referred to and made part of this complaint, except as directed or permitted by the order or decree of this Court; and that a receiver be appointed of the said stock and property; and for such other and further relief as may seem just and proper, with the costs and disbursements of this action.

DITTENHOEFER, GERBER & JAMES,
Plaintiff's Attorneys.

Office & Post Office Address, No. 96 Broadway, Borough of Manhattan, New York City.

26 "EXHIBIT A."

Agreement for the Reorganization of the Houston & Texas Central Railway Company.

Agreement made this twentieth day of December, in the year one thousand eight hundred and eighty-seven, by and between the undersigned holders of the first-mortgage (main line) bonds of the Houston and Texas Central Railway Company, parties of the first part; the undersigned holders of the first-mortgage (Western division) bonds of said railway company, parties of the second part; the undersigned holders of the first-mortgage (Waco and Northwestern division) bonds of said railway company, parties of the third part; the undersigned holders of the consolidated mortgage (main line and Western division) bonds of the said railway company, parties of the fourth part; the undersigned holders of the consolidated mortgage (Waco and Northwestern division) bonds

of the said railway company, parties of the fifth part; the undersigned holders of the general mortgage bonds of the said railway company, parties of the sixth part; the Southern Pacific Company, a corporation organized under the laws of the State of Kentucky, party of the seventh part; and the Central Trust Company of the City of New York, party of the eight- part.

Whereas, the undersigned parties of the first, second, third, fourth, fifth and sixth parts are respectively holders of the bonds of the said Houston and Texas Central Railway Company of the classes above designated respectively to the amounts set opposite their respective signatures hereto, and of the unpaid coupons appertaining to such bonds maturing at dates subsequent to
27 January 1, 1885, (except the first-mortgage coupons maturing July 1, 1885), which have been paid, and the said Southern Pacific Company is interested in connecting roads in conjunction with which it desires such Houston and Texas railway to be operated.

And whereas, in order to secure as promptly as may be a reorganization of said railway company, and an adjustment of the respective interests of the several parties hereto in respect to the property of said company, the said parties hereto have agreed to the following—

Plan of Reorganization.

All existing mortgages (with the possible exception of those upon the Waco and Northwestern division) to be foreclosed, and a new company organized, which shall acquire all the property and franchises of the present railway company, and thereafter issue new bonds, equal in amount to the principal of the outstanding first mortgage, consolidated mortgage and general mortgage bonds; that is to say: A new first mortgage to be executed upon the entire line of railroad, its franchises, stations, shops, terminal facilities, rolling stock and equipments, and upon all the lands now covered by all three of the present first mortgages for an amount equal to the principal of all the outstanding first-mortgage bonds as hereinafter provided.

Also a new mortgage to secure bonds equal in amount to the principal of all the outstanding consolidated mortgage bonds of both classes, as hereinafter provided, which said new mortgage is to be a second mortgage upon the whole line of railroad, its franchises, stations, shops, terminal facilities, rolling stock and equipment, and a first mortgage upon all the lands, now covered by both con-
28 solidated mortgages, as also upon the town lots belonging to said railway company.

And also a new general mortgage subject to the liens, rights and priorities of the above-mentioned new mortgages, which shall cover all the property of said railway company to secure bonds of an amount equal to the principal of the outstanding general mortgage bonds as hereinafter provided.

In the event that this agreement shall not be accepted by the holders of at least sixty (60) per cent. of the existing bonds secured by the first mortgage on the Waco and Northwestern division, or if

for any reason it should be found that said first mortgage upon said division cannot be foreclosed without delaying this reorganization, then the holders of said Waco and Northwestern division first-mortgage bonds are not to participate in this reorganization, and the consolidation of mortgage bonds and mortgages as above proposed is to apply only and to be limited to the bonds and mortgages issued upon the main line and Western divisions of said roads, and the security for the new mortgage bonds is to be limited accordingly.

The New First-Mortgage Bonds

to be issued for exchange for existing first-mortgage bonds as aforesaid to have fifty years to run from July 1, 1887, with interest payable semi-annually thereafter, at the rate of five (5) per cent. per annum the interest to be guaranteed by the Southern Pacific Company and both interest and principal to be payable in gold.

The said new first-mortgage bonds to be exchanged, bond for bond, with the holders of the old first-mortgage bonds participating herein, and in addition thereto, the said holders of the old first-mort-
29 gage bonds participating herein to be paid the face value (without interest) of the unpaid coupons or unpaid portions of coupons appertaining to such bonds deposited by them up to and including the coupons maturing July 1, 1887, and also a bonus of fifty dollars in cash upon each bond, such bonus to be paid at the time of the deposit of said bond, upon the terms and conditions hereafter prescribed.

The New Consolidated Mortgage Bonds

to be issued and secured by mortgage as above to an amount equal to the amount of the principal of the consolidated mortgage bonds now outstanding.

The said new consolidated mortgage bonds to mature October 1, 1912, with interest from Oct. 1, 1887, payable semi-annually, at the rate of six (6) per cent. per annum, the interest to be guaranteed by the Southern Pacific Company, both principal and interest to be payable in gold, and to be exchanged bond for bond, with the holders of the old consolidated mortgage bonds participating herein.

In addition thereto, the holders of said consolidated bonds participating herein to be given debenture bonds of the new company, payable in ten years from October 1, 1887, with interest thereon payable semi-annually, at the rate of six (6) per cent. per annum for three-fourths of the face value (without interest) of the unpaid coupons upon said old bonds deposited by them, to and including those maturing Oct. 1, 1887, both the principal and interest of said debenture bonds to be guaranteed by the Southern Pacific Company.

This issue of new consolidated mortgage bonds is to include bonds of the par value of one million one hundred and forty-nine thousand ($1,149,000) dollars to take up the old consolidated mort-
30 gage bonds of like amount heretofore surrendered to the Farmers' Loan and Trust Company as trustee of the existing general mortgage, and in lieu of which general mortgage bonds were issued.

Said bonds are to be delivered and held by the trustee of the general mortgage hereinafter provided for, but only as collateral security for the bonds to be issued under that mortgage, and are not to draw interest or to be subject to redemption from the proceeds of land sales until default made under the mortgage and the becoming due of the principal of all the bonds issued thereunder, and no debenture bonds are to be issued on account of the coupons appertaining to said existing bonds so held by the Farmers' Loan and Trust Company, and when such issue of new general mortgage bonds shall have been paid, the new company shall be entitled to the return to it on demand of such collateral consolidated mortgage bonds.

The holders of the present consolidated mortgage bonds assenting hereto depositing their bonds, except the holders of said one million one hundred and forty-nine thousand ($1,149,000) dollars of said bonds, to pay at the time of such deposit a sum equal to three-fourths of one per cent. of the principal of the bonds so deposited, which shall be applied on account of the charges, expenses and disbursements of the committee of the consolidated mortgage bondholders as hereinafter provided.

New General Mortgage Bonds

secured by mortgage as above set forth to be issued to the amount of the principal of the general mortgage bonds now outstanding, including the 945 general mortgage bonds heretofore hypothecated to the Southern Development Company, Morgan's Louisiana
31 and Texas Railroad and Steamship Company, and the National City bank; said new general mortgage bonds to mature April 1, 1921, and to bear interest, payable semi-annually, at the rate of four (4) per cent. per annum from October 1, 1887, the interest thereon to be guaranteed by the Southern Pacific Company and both principal and interest to be payable in gold. Such new bonds to be exchanged, bond for bond, with the holders of the existing general mortgage bonds participating herein; the Southern Development Company and Morgan's Louisiana and Texas Railroad and Steamship Company, which are now the pledge-s of eight hundred and eighty of the existing bonds, to take the same number of new bonds at par, in cancellation of $880,000 of the indebtedness to them of the present railroad company; and in addition thereto such holders of the existing general mortgage bonds to be given debenture bonds of the new company, payable ten years from October 1, 1887, bearing interest payable semi-annually at the rate of four (4) per cent. per annum, for two-thirds of the face value (without interest) of the unpaid coupons appertaining to the said existing general mortgage bonds deposited by them to and including the coupons maturing October 1, 1887, both principal and interest of said last-mentioned debenture bonds to be guaranteed by the Southern Pacific Company.

The holders of the present general mortgage bond- and of the Farmers' Loan and Trust Company trust certificates therefor who shall deposit their bonds or cause or authorize bonds to be deposited hereunder, or who shall assent hereto, to pay a sum equal to three-fourths of one per centum of the principal of the bonds so de-

posited or assented respectively, which sum shall be payable
32 at the time of such deposit or assent and shall be applied on account of the charges, expenses and disbursements of the committee of general mortgage bondholders as hereinafter provivded.

The Capital Stock

of the new company to be ten millions of dollars ($10,000,000), to be issued and divided *pro rata* among such holders of the floating debt of the said railway company as within a time to be prescribed by the said party of the eighth part may provide a *pro rata* share, proportionate to the whole of the floating debt of the company, of the cash payments to be made under this plan for interest and bonus to holders of the first-mortgage bonds and coupons, and otherwise, in carrying out the provisions of this agreement.

Provided, however, that the present holders of the capital stock of the Houston and Texas Central Railway Company, may, within a time to be prescribed by the said trust company therefor, if they should elect so to do, provide their *pro rata* share, proportionate to the whole outstanding capital stock of the present company, of the amounts requisite to discharge the whole floating debt of the company, and to provide for the cash payments above referred to and for the other necessary charges and expenses to be incurred in this reorganization; and in that event such stockholders shall be entitled to receive a like proportionate part of the stock of the reorganized company; and in the event that any portion of such capital stock of the present company, of the holders of the floating indebtedness of the said railway company, or by the stockholders thereof as above provided, then the Southern Pacific Company, or its appointee, upon providing such portion of the cash payments to be made here-
33 under for interest and bonus to the holders of the first-mortgage bonds and coupons, and for other necessary charges and expenses to be incurred in this reorganization as herein provided, as shall not have been so provided by the floating-debt creditors and stockholders of said railway company, is to be entitled to the entire balance of the stock of the new company not so taken up; and in the further event that the Southern Pacific Company, or its appointee, shall not make provision therefor within thirty (30) days after notice to it in writing of the amount so remaining unpaid, then so much of said stock as shall be necessary is to be sold to meet such cash payments, charges and expenses.

Syndicate.

A syndicate or syndicates, to be formed, if necessary, for the purpose of facilitating the conversion of the outstanding bonds, and the carrying out of this reorganization.

Now, therefore, for the purpose of carrying this plan of reorganization into effect, this agreement witnesseth:

That the parties hereto, for and in consideration of the mutual covenants and agreements herein contained, and the sum of one dollar by each of the parties hereto to the others in hand paid, the re-

ceipt whereof is hereby acknowledged (the said several parties each covenanting and agreeing for himself, herself or itself only, and not incurring any obligation for any other thereby), covenant and agree as follows, to wit:

First. The said Central Trust Company, party of the eighth part, shall be, and it is, hereby appointed a purchasing trustee, by itself, or through such agencies as it may designate in that behalf,
34 to exercise the powers and perform the duties hereinafter set forth; and the said Central Trust Company hereby assents to act in that capacity.

Second. The parties of the first, second, third, fourth, fifth and sixth parts hereto, holders of the several classes of bonds of said railway company; being the owners or representatives of the owners of said bonds to the amount of bonds respectively set opposite their names, together with the unpaid coupons above mentioned thereunto appertaining, will deposit the same with the said Central Trust Company upon notice therefrom being given as hereinafter provided, and accept in lieu of said bonds and coupons a certificate, or certificates of deposit therefor, such certificates to be in form suitable for listing upon the New York stock exchange; and they will in all cases, execute good and sufficient transfers of their said bonds and coupons in a form to be determined by said Central Trust Company, and deposit the same with the said trust company, so that the legal title to the said bonds and coupons shall become vested in the said trust company for the use, and subject to the control of said trust company as trustee for the purposes of this agreement.

There shall be paid to the depositors of such first-mortgage bonds and coupons at the time of depositing the same the sum of fifty (50) dollars upon each bond so deposited, and the Southern Pacific Company, party of the seventh part, agrees to furnish to said Central Trust Company the amount necessary to pay said sums and shall be repaid therefor with interest out of the moneys to be raised by the stockholders, the floating-debt holders and by the other methods hereinafter provided for defraying the charges and expenses of this reorganization.

35 In the event that this reorganization should fall through and the Central Trust Company should determine to return the bonds so deposited to the holders of the certificates therefor, then as a condition precedent to the return of said first-mortgage bonds the bonus so paid as aforesaid shall be repaid without interest by each first-mortgage certificate-holder to the said Central Trust Company, for the use and benefit of and for repayment on demand to the said Southern Pacific Company, and said Southern Pacific Company shall have a lien on such bonds for such payment.

The parties of the fourth part, other than the holders of the $1,149,000 of existing consolidated mortgage bonds now held by said Farmers' Loan and Trust Company, further agree to pay to the said trust company at the time of making deposit of their bonds a sum equal to three-fourths of one per cent. of the principal of the bonds so deposited, to be turned over by the said Central Trust Company to Albert S. Rosenbaum, Esq., as chairman of the committee

of the consolidated mortgage bondholders, to be applied by him or them on account of their charges, compensation, expenses and disbursements in the effecting of this reorganization, but the Farmers' Loan and Trust Company, as the holder of said one million one hundred and forty-nine thousand ($1,149,000) dollars of existing consolidated mortgage bonds, shall not be required to contribute to such charges and expenses.

The parties of the sixth part (being the holders of existing general mortgage bonds and of the Farmers' Loan and Trust Company trust certificates therefor) who shall deposit their bonds or cause or authorize such bonds to be deposited hereunder, or who shall assent
36 hereto further agree to pay to the said Central Trust Company a sum equal to three-fourths of one per cent. of the principal of the bonds so deposited or assented respectively, to be turned over by said trust company to Henry Budge, Esq., as chairman of the committee of said general mortgage bondholders, and to be applied by him or them on account of the charges, compensation, expenses and disbursements of said committee. Said sums shall be payable forthwith on deposit of bonds hereunder and must be paid before the new negotiable trust certificates or other securities hereinafter provided for can be delivered.

The Southern Development Company and Morgan's Louisiana and Texas Railroad and Steamship Company by signing this agreement covenant that as to themselves the eight hundred and eighty bonds hypothecated to them shall be regarded as assenting bonds, and shall be charged as such with all the obligations which this agreement may or does impose on the general mortgage bonds or the holders thereof.

As regards the sixty-five bonds claimed by the National City bank to have been hypothecated to it, the said Central Trust Company is hereby authorized and empowered to make such settlement with said bank as to said trust company in its discretion shall seem just and right to all concerned, subject, however, to the collection on the said bonds of the assessment of three-fourths of one per centum herein provided.

And the parties of the sixth part hereby assign, transfer, set over and convey unto the said Central Trust Company all their right, title and interest, security and lien in, to and upon the railroad,
lands, and other property of the Waco and Northwestern
37 division of said railway company, under and by virtue of any of the mortgages thereon as well as by reason of any and all bonds issued upon said division and now held by or for the benefit of the parties of the sixth part, and they do hereby nominate and appoint the said Central Trust Company their true and lawful attorney irrevocable and with power of substitution, to collect and receive all such sums of money, proceeds and property as may hereafter become due and payable or be realized upon the bonds hereby surrendered by the parties of the sixth part under any foreclosure of any of the present mortgages upon said Waco and Northwestern division or either of them or any sale thereunder or otherwise; all such sums of money, proceeds and property to be applied by said

Central Trust Company towards the purchase and cancellation or further security as the case may be, first, of the new interest-bearing consolidation mortgage bonds hereinafter provided for, and second, of the new general mortgage bonds; the foregoing provision being made for the contingency that the new consolidated mortgage bonds cannot be made a lien upon the said Waco and Northwestern division, otherwise the said provision not to be operative.

Third. The said trust company shall invite, by proper publication to be determined by it, the holders of all classes of such securities to assent to and become parties to this agreement, by signing the same, and by depositing and transferring their securities, and receiving the certificates as herein provided, and shall fix the time within which it may be done; and after the expiration of the time so to be fixed and limited no holder of any such securities of any class, who shall not within the time so fixed and limited
38 have complied with the provisions of this agreement by depositing the securities and making such transfers, shall have, or be entitled to have, any of the rights or privileges herein provided, nor be entitled in any way to participate in the benefits of this agreement.

Provided, however, that the said trust company shall have the power in its discretion, to extend or reopen the time so fixed and limited, but such extension or reopening shall be held and construed only for the benefit of such persons as shall actually deposit their securities and make such transfers within the time as so extended or reopened.

And provided further, that the said trust company shall have power, in its discretion, at any time, to admit to a participation in such privileges and to the new securities to be issued hereunder and the benefit thereof, any security-holder belonging to either of the classes entitled to participate in such benefits, upon such terms and conditions, and under such penalties as the said trust company shall in its discretion see fit to impose; but such action on the part of said trust company shall not be deemed or taken to establish any privilege for any other non-assenting security-holder.

And the said trust company shall also have full power in its discretion to make equitable provision in any case of lost or destroyed bonds or coupons or detached coupons.

Fourth. Whenever, in the judgment of the said trust company, party of the eighth part, a sufficient number of all or any of the classes of bonds and coupons hereinbefore referred to (but not less in any case, than sixty (60) per cent. of the outstanding
39 amount of each class, other than the first-mortgage and consolidated mortgage bonds of the Waco and Northwestern division of said railroad), shall have assented to this agreement, said trust company shall give notice by proper publication, to be determined by it, of such fact, and that it will proceed with the further execution of the duties hereby imposed upon and assumed by it as purchasing trustee, as aforesaid. The sixty per cent. of the outstanding bonds in the foregoing portion of this paragraph mentioned, is to be computed in the case of the consolidated mortgage

bonds upon the amount of such bonds outstanding other than the $1,149,000 in par value thereof, held by the Farmers' Loan and Trust Company as herein set forth, and in the case of the general mortgage bonds upon the amount of such bonds outstanding other than the nine hundred and forty-five thousand dollars in par value thereof, hypothecated by the present railway company to Morgan's Louisiana and Texas Railroad and Steamship Company, the Southern Development Company, and the National City bank.

The said trust company may, at its election, if in its opinion a sufficient number of all, or any, of the classes of bonds or coupons hereinbefore referred to shall not have been deposited according to this agreement, return any and all classes of bonds and coupons to the owners thereof without charge or expense to them other than those incurred by or to their several committees, except, however, that all such bonds and coupons shall not be returned for, or by reason of any failure to deposit Waco and Northwestern division bonds.

In the event that this agreement shall not be accepted by at least sixty (60) per cent. of the holders of the said first-mortgage
40 bonds of the Waco and Northwestern division, or if, for any reason, it should be found that the said division cannot be included in this reorganization without delaying the same, then the said trust company shall proceed to execute this agreement and to carry out the proposed reorganization without participation therein of the holders of the first-mortgage bonds upon said Waco and Northwestern division, and the bonds of that division theretofore deposited shall be returned to the holders of the certificates therefor without charge; but such failure to participate on the part of the Waco and Northwestern division bondholders shall not affect the issue of consolidated mortgage bonds as hereinafter provided for the security of the new general mortgage bonds.

The parties hereto authorize and request the Farmers' Loan and Trust Company and Messrs. James Rintoul and Nelson S. Easton, holding old consolidated mortgage bonds as trustees, to surrender the same to the party of the eighth part for exchange of cancellation of otherwise facilitating the carrying out this agreement.

Fifth. When in the judgment of the said trust company, party of the eighth part hereto, a sufficient number of all or any of the classes of bonds hereinbefore referred to shall have been deposited under this agreement, being not less than the amount hereinabove specified, it shall proceed, by any and all legal and proper means, to procure, or cause to be procured, by the foreclosure of the mortgages upon and a sale of all of the property of said railway company, such sale to be had as an entirety if practicable, under the decree or decrees of a court or courts of competent jurisdiction.

41 And for the purposes of this agreement it may assist in the prosecution, or become a party to any and all suits now pending, or which may hereafter be brought, affecting said property; and shall have, and is hereby given power and authority, in its option, to declare the principal of the bonds deposited hereunder to be due.

And at any sale of any property of the said railway company, or

any part thereof, it is hereby authorized and empowered, in its own name, or in the name of such agent or agents as it may designate, to bid and pay for such properties, such sums as in its judgment may be necessary to protect the interests of the parties hereto.

Sixth. The said trust company, party of the eighth part, shall cause a new corporation to be formed and incorporated under the laws of the State of Texas, with power to acquire all the property and franchises which the said trust company, by itself, or its designated agents, may purchase or may have purchased at said sale or sales.

And the said trust company, or its designated agents, shall have the right to appoint such associates, and to cause to be subscribed for and actually pain in cash all such amounts as shall be necessary to complete the valid organization of said new corporation in conformity with the laws of the State of Texas, and in all respects to take all steps and do such acts, including the selection and qualification for such associates, as it shall be advised by counsel are requisite and necessary to effect the valid organization of the said new corporation.

Seventh. The said trust company shall convey, or cause to
42 be conveyed, the franchises and property so purchased by it, or by its designated agents, as aforesaid, to such new company, and shall accept and receive in payment therefor the following amounts of the stock and bonds of the said new company (being the total issues thereof); that is to say:

1. First-mortgage bonds to the same amount, at their par value, as the principal of the now outstanding first-mortgage bonds of the classes participating herein, to be secured, in the event that the holders of the existing first-mortgage (Waco and Northwestern division) bonds participate herein, by a first mortgage upon the entire line of the railroad, its franchises, stations, terminal facilities, rolling stock, and equipment, and upon all the lands now covered by all three of the existing first mortgages upon the several divisions of said road; and in the event that the holders of said Waco and Northwestern division first-mortgage bonds shall not participate herein, such mortgage shall be upon the railroad, franchises, stations, terminal facilities, rolling stock and equipment of the main line and Western divisions only, and upon all lands covered by the existing main line and Western division first mortgages; the issue of such new first mortgage bonds in no event to be greater in amount than the principal of the old first-mortgage bonds outstanding upon the divisions included in the new first mortgage; due provision being made as heretofore for the amount due the State of Texas for loans from the school fund.

Said new first-mortgage bonds shall be payable in fifty (50) years from July 1, 1887, with interest at the rate of five (5) per cent. per annum, payable semi-annually, both principal and interest to be payable in gold coin.

43 2. Mortgage bonds of the same amount as the principal of the classes of the outstanding consolidated mortgage bonds participating herein, to be secured, in the event that the Waco and Northwestern division shall be included in this reorganization, by

a second mortgage upon the entire line of railroad, its franchises, stations, terminal facilities, rolling stock and equipment, and by a first mortgage upon the lands now covered by the existing consolidated mortgages upon the several divisions of said road, as also upon all the town lots, belonging to said railway company, however acquired; and in the event that the said Waco and Northwestern division shall not be included in this reorganization, then such mortgage shall be upon the main line and Western division only of said road, its franchises, stations, terminal facilities, rolling stock and equipment, and upon the lands now covered by the said main line and Western division consolidated mortgages; and also upon said town lots and upon all such rights, interests and equities as shall have been or may be acquired under this agreement by the party of the eighth part in the franchises and property of said Waco and Northwestern division. Said new bonds shall be payable on October 1, 1912, and shall bear interest at the rate of six (6) per cent. per annum from and after October 1, 1887, payable semi-annually, both principal and interest to be payable in gold coin; it being understood and agreed that bonds shall be issued sufficient in amount to include the consolidated mortgage bonds to the par value of one million one hundred and forty-nine thousand dollars ($1,149,000) heretofore deposited by the present railway company with, and now held by, the Farmers' Loan
44 and Trust Company, the trustee named in the existing general mortgage, and in place of which general mortgage bonds have heretofore been issued.

Said new consolidated mortgage bonds in par value of one million one hundred and forty-nine thousand ($1,149,000) dollars are to be delivered to the trustee of the new general mortgage, hereinafter mentioned; provided, however, that until the existing main line and Western division consolidated mortgage bonds now held by the Farmers' Loan and Trust Company, as trustee, shall have been surrendered or the lien thereof extinguished, the same amount of the new consolidated mortgage bonds shall be held by the party of the eighth part hereto for the protection of and for the benefit of the new general mortgage bonds, but subject to such equities as may exist or arise by reason of the non-extinguishment of the lien of said existing bonds; it being intended that the new general mortgage bonds shall have the benefit of the new consolidated mortgage bonds, so to be issued in lieu of all benefit and advantage which they, or the bonds for which they are to be exchanged, would have by reason of the consolidated mortgage bonds now held by the Farmers' Loan and Trust Company as aforesaid.

The said one million, one hundred and forty-nine thousand ($1,149,000) dollars of new consolidated mortgage bonds shall be held only as collateral security for the new general mortgage bonds hereinafter mentioned, and the proceeds thereof under any foreclosure sale or other liquidation of such security shall be applied towards the payment of said new general mortgage bonds, but said one million one hundred and forty-nine thousand ($1,149,000)

dollars of new consolidated mortgage bonds shall not draw
45 interest or be subject to redemption from the proceeds of land sales until default is made on said new consolidated mortgage and the principal of all the bonds issued thereunder declared due, as hereinafter provided, upon the happening of which events said bonds shall be entitled to draw interest from the date of the maturity of the last coupons paid by the new railway company upon the others of said new consolidated bonds and shall thereafter be treated in all respects the same as the other new consolidated bonds, provided that when the issue of new general mortgage bonds shall have been paid, the new company shall be entitled to the return to it on demand of such collateral consolidated mortgage bonds.

3. Mortgage bonds to the same amount as the principal of the general mortgage bonds now outstanding, including the general mortgage bonds heretofore hypothecated to the Southern Development Company, Morgan's Louisiana and Texas Railroad and Steamship Company, and the City bank; such new bonds to be secured by a mortgage upon all the property of said railway company subject to the respective liens, priorities, and rights of the several mortgages above set forth.

Said new general mortgage bonds shall be payable on April 1, 1921, and shall bear interest at the rate of four (4) per cent. per annum from and after October 1, 1887, payable semi-annually, both principal and interest to be payable in gold coin.

4. Debenture bonds of the new company, payable in ten (10) years from October 1, 1887, bearing interest at the rate of six (6) per cent. per annum, payable semi-annually, for three-fourths the face value (without interest) of the unpaid coupons of the
46 several classes of consolidated mortgage bonds participating herein, maturing on or prior to October 1, 1887.

5. Debenture bonds of the new company, payable in ten (10) years from October 1, 1887, bearing interest at the rate of four (4) per cent. per annum, payable semi-annually, for two-thirds of the face value (without interest) of the unpaid coupons of the general mortgage bonds maturing on or prior to October 1, 1887, other than those appertaining to the 880 bonds heretofore hypothecated to Morgan's Louisiana & Texas Railroad and Steamship Company and the Southern Development Company.

6. Stock to the amount of ten million dollars.

7. The interest on all classes of the new bonds hereinbefore provided for, as also the principal of said debenture bonds shall be guaranteed by the Southern Pacific Company, party of the seventh part hereto.

Said new first mortgage and said new consolidated mortgage shall contain provisions authorizing the sale free and discharged from the liens of such mortgages of the lands, including the town lots, covered by them respectively, and also provisions authorizing and requiring the new company to purchase, with the proceeds of the sales of such lands covered by such respective mortgages, bonds of the class secured thereby, at the market rates, not exceeding one

hundred and ten (110) per centum of the par value thereof and accrued interest; and that in the event that the bonds cannot be purchased at or below that rate, the said new railway company shall be authorized and required at least once in each year to draw such bonds by lot to be paid for out of the proceeds of such land
47 sales at the rate of one hundred and ten (110) per centum of the par value, and accrued interest; and that the bonds so drawn shall cease to bear interest from and after sixty days' public notice of such drawing. Suitable clauses shall be inserted in said mortgages for the enforcement of these provisions by the trustees named in said mortgages.

The new general mortgage shall be so framed that such sales of land under the provisions of the new first or new consolidated mortgage, shall fully release the lands or town lots so sold from any lien or claim of lien of such general mortgage thereon.

The mortgages securing the several classes of bonds hereinbefore provided for shall also contain provisions authorizing the trustees thereunder to enforce the rights of the bondholders by taking possession, or by suit, after six (6) months' default in the payment of any semi-annual installment of interest, and making the principal of all the bonds immediately due and payable upon such default, at the option of the trustees named in said mortgages respectively, as also at the option of a majority in amount of the bondholders secured by such mortgages respectively.

And generally, such mortgages shall be in such form, and contain such usual and ordinary provisions in other respects as the said trust company shall approve.

Eighth. When the said new railway company shall have been organized, and the above-mentioned bonds and stocks shall have been received by the said trust company, party of the eighth part hereto, as aforesaid, it shall deliver to the holders of its
48 certificates issued for the first-mortgage bonds and coupons so to be deposited as aforesaid, and entitled to participate herein, and in exchange therefor, new first-mortgage bonds of like amount, bond for bond, and in addition thereto shall pay the holder of such certificate for each such bond, in cash, the face value (without interest, of the unpaid coupons or portions of coupons appertaining to such bond deposited by him, up to and including the coupon maturing on July 1, 1887.

It shall deliver to the holders of certificates of consolidated bonds and coupons so deposited as aforesaid, and entitled to participate herein, and in exchange therefor, new consolidated bonds of like amount, bond for bond, and also said debenture bonds of the new company, bearing interest at the rate of six (6) per cent. per annum, for three-fourths of the face value (without interest) of the unpaid coupons appertaining to said bonds deposited by them up to and including the coupon maturing on October 1, 1887, and shall deliver to the trustee of the new general mortgage the one million one hundred and forty-nine thousand dollars at par value, of new consolidated mortgage bonds, subject, however, to the provisions of subdivision 2 of paragraph seventh, of this agreement.

It shall deliver to holders of certificates for the general mortgage bonds and coupons deposited as aforesaid, and in exchange therefor, new general mortgage bonds of like amount, bond for bond, and shall also deliver to the holders of such certificates said debenture bonds of the new company, bearing interest at the rate of four (4) per cent. for two-thirds of the face value (without in-
49 terest) of the unpaid coupons belonging to the existing general mortgage bonds deposited by them to and including the coupon maturing on October 1, 1887.

It shall deliver to the Southern Development Company and Morgan's Louisiana and Texas Railroad and Steamship Company eight hundred and eighty of the new general mortgage bonds, upon surrender or cancellation by those companies of the 880 existing bonds now held by them as collateral security as above mentioned, or of the certificates of deposit therefor.

The new bonds so to be received by those companies shall be applied at their par value in payment of those debts and claims which those companies now hold against the present Houston and Texas Central Railway Company, and to secure which the said existing eight hundred and eighty bonds have been hypothecated, and shall be taken in payment for eight hundred and eighty thousand dollars of said debts and claims; and said companies shall upon receipt of said new bonds give to the party of the eighth part hereto an acquittance and satisfaction of the aforesaid amount of their debts and claims and to that extent they shall cease to be entitled to any rights under this agreement as holders of the floating debt of said existing railway company.

In the event that any of the bondholders shall not have assented to this agreement the said Central Trust Company shall deliver the bonds and other benefits which would have been distributed to such bondholders, had they assented hereto, to the person or persons who shall have provided the money to make the payment to said non-assenting bondholders as elsewhere herein provided.

Scrip bearing interest may be issued for fractional rights
50 in the several classes of debenture bonds convertible into bonds of the corresponding classes respectively.

Ninth. The said ten million dollars, ($10,000,000) par value of said new stock is to be issued to, and shall be divided *pro rata* among, such holders of the floating debt of the said railway company as, within a time to be prescribed by said trust company, may provide a *pro rata* share, proportionate to the whole floating debt of the company, of the cash payments to be made hereunder for interest and bonus to the holders of the first-mortgage bonds and coupons, and for the necessary charges, expenses and liabilities incurred, or to be incurred, by the said trust company in carrying out the provisions of this agreement.

Provided, however, that the holders of the existing capital stock of the Houston and Texas Central Railway Company may, within a time to be prescribed by said trust company therefor, if they shall elect so to do, provide their *pro rata* share proportionate to the whole outstanding capital of the present company of the amount

requisite to discharge the floating debt of the company, and to provide for the cash payments, charges, expenses, and liabilities above referred to; and in that event they shall be entitled to receive a like proportionate amount of stock of said reorganized company.

The amount of such *pro rata* share to be paid, whether by the holders of the floating indebtedness of said company, or by said stockholders, is to be fixed and determined by said trust company.

51 Tenth. In the event that any portion of such capital stock shall not be taken up by either the holders of the floating indebtedness of said Houston and Texas Central Railway Company, or by the stockholders thereof, under the provisions in that behalf hereinbefore contained, then and in that event the Southern Pacific Company or its appointee, upon providing such portion of the cash payments to be made hereunder for interest and bonds to the holders of the first-mortgage bonds and coupons, and for the necessary charges, liabilities and expenses incurred by said trust company in carrying out the provisions of this agreement as shall not have been provided by the floating-debt creditors or stockholders of the said Houston and Texas Central Railway Company hereunder, shall be entitled to the entire balance of stock of the new company not so taken, but in the event that the Southern Pacific Company or its appointee shall not make provision therefor within thirty (30) days after notice to them in writing, by said trust company, of the amount so remaining unprovided for, then, and in that event, the said trust company shall have power, and it is hereby authorized to sell so much of said stock not so taken, as shall be necessary, and apply the proceeds thereof to the payment of the charges, expenses and liabilities incurred by it in this reorganization, and all stocks, securities, moneys and property whatsoever remaining in its hands after the discharge of such charges, expenses and liabilities under this agreement shall be delivered by it to the new company so to be organized.

52 Eleventh. In case the Southern Pacific Company, or its appointee, shall provide the money for the payment in cash of the proportionate amount of the sum needed for distribution to the non-assenting security-holders, it shall be entitled to all the rights, privileges and benefits which would have appertained to any such non-assenting security-holders had they elected to become parties to this agreement; but, if after thirty days' notice so to do as above provided, said Southern Pacific Company, or its appointees, shall not provide such money, then the said trust company is hereby authorized to raise moneys by the organization of a syndicate or syndicates for such purpose, or in such other way as such trust company may deem best, and to make all necessary arrangements and agreements for the compensation of such syndicate or syndicates, or person or persons with whom such arrangement may be made.

And the syndicate or syndicates so formed, or other persons furnishing such moneys under agreement with the said trust company, shall be entitled to all the rights, privileges and benefits which

would have appertained to any such non-assenting security-holders had they elected to become parties to this agreement.

Twelfth. The said trust company shall have all the powers necessary to carry out this plan of reorganization effectually. It may do all things, necessary for the proper execution and issue of the mortgages, bonds, and debentures above provided for, including voting on the stock of the new company therefor. It may employ counsel, agents and all necessary assistants, and may determine and allow them a reasonable compensation.

It shall also prescribe the form of the new securities and
53 certificates of stock, and shall have power to create all necessary trusts contemplated by this reorganization.

If by reason of legal or other objection any of the provisions of this agreement cannot be strictly performed by said trust company, then said trust company shall conform as nearly as may be to such provisions in the execution of this agreement.

The said trust company shall have power to modify the above plan in any matter of detail not directly affecting the ultimate results to the parties to this agreement. It shall give notice of any proposal modification by annexing the same to the original of this agreement and by advertising the substance thereof in at least three daily newspapers published in the city of New York, at least twice a week and during two weeks, and such advertising shall be considered to have the full effect of personal notice.

All parties who do not express in writing their dissent from such modification, and deliver such written dissent to said trust company within two weeks from the date of the last publication, shall be considered to have assented to such modification.

Thirteenth. The moneys received by the said trust company from earnings in excess of operating expenses, or from receivers, and all proceeds from sales of property other than lands which may come into the possession of said trust company, shall be used and disbursed by the said trust company (unless affected by some other trust or obligation), for the purpose of making such betterments and improvements of the railway and its property, as may be necessary and acquiring necessary rolling stock and equipment; for the
54 settlement and purchase of any claims against or liabilities of the said railway company, having priority over or equities superior to said mortgages, including any and all receivers' certificates which have at any time been or may hereafter be issued, and which said trust company may deem it advisable to settle or purchase; for the expenses of the various foreclosure or other suits; for the expenses, liabilities and compensation of said trust company, and its agents, counsel and employees; and for such other payments as may be required under the decree or decrees of sale or other order of the court in the progress of the various suits.

Any balance remaining on hand after the payment of the charges, expenses and liabilities of said trust company under this reorganization, shall be turned over by it to the new railway company.

Fourteenth. The Southern Pacific Company, party of the seventh part hereto, hereby agrees when called upon by the said trust com-

pany so to do, after the organization of the new company under this agreement, to execute in due form the guarantees upon the several classes of bonds as hereinbefore provided, the manner and form of such guarantees to be prescribed by the said trust company.

Fifteenth. The said Central Trust Company shall be allowed a reasonable compensation for its services under this agreement, which shall be treated as part of the expenses of this reorganization hereinbefore provided for, to be paid by parties other than the bondholders.

The amounts hereinbefore prescribed to be paid by holders
55 of consolidated mortgage and general mortgage bonds upon deposit of bonds held by them respectively are not to be deemed to be in anywise a part of the costs, expenses and liabilities required to be paid by parties other than the bondholders.

Sixteenth. This agreement shall be printed and copies thereof may be signed; and all of said copies so signed shall be deemed and taken as constituting one original paper; and the deposit of securities and certificates shall have the same effect as if the holders thereof had actually subscribed this agreement.

Seventeenth. If this agreement shall not have been assented to by the holders of at least sixty (60) per cent. in amount of each class of the existing bonds above described, other than those of the Waco and Northwestern division, on or before sixty days from the date hereof, then any depositor may withdraw the bonds deposited by him, provided such withdrawal be made prior to the announcement by the said trust company that a deposit of sufficient bonds has been made and that it will proceed to carry out the execution of this plan of reorganization as hereinbefore provided for.

In witness whereof the said parties have hereunto set their names or affixed their corporate seals, and have written opposite their names or seals the amount of the bonds held by them and the classes thereof.

56 STATE OF NEW YORK,
City of New York, County of New York, ss:

Walter B. Lawerence, being duly sworn, says: That he is the plaintiff in the above entitled action; that he has read the foregoing Complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

WALTER B. LAWRENCE.

Sworn to before me, this 18" day of February, 1908.

THOMAS F. GARRITY,
Commissioner of Deeds, City of New York.

57 New York Supreme Court, County of Queens.

WALTER B. LAWRENCE, Suing on Behalf of Himself and Other Stockholders of the Houston and Texas Central Railway Company Similarly Situated Who May Come in and Contribute to the Expenses of this Action, Plaintiff,

against

SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL Trust Company of New York, Farmers' Loan and Trust Company, Metropolitan Trust Company of the City of New York, The Houston and Texas Central Railroad Company, and Houston and Texas Central Railway Company, Defendants.

The petition of Southern Pacific Company, Frederic P. Olcott and The Houston and Texas Central Railroad Company, defendants in the above entitled action, respectfully shows and alleges:

First. That your petitioner, Southern Pacific Company, now is, and at the time of the commencement of this action was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and a citizen and resident of the State of Kentucky.

That your petitioner, Frederic P. Olcott, now is, and at the time of the commencement of this action was, a citizen and resident of the State of New Jersey.

That your petitioner, The Houston and Texas Central Rail-
58 road Company, now is, and at the time of the commencement of this action was, a corporation organized and existing under and by virtue of the laws of the State of Texas, and a citizen and resident of the State of Texas.

That the defendant, Houston and Texas Central Railway Company, now is, and at the time of the commencement of this action was, a corporation duly organized and existing under and by virtue of the laws of the State of Texas.

Second. That the plaintiff herein now is, and at the time of the commencement of this action was, a citizen and resident of the State of New York, as appears by the allegation contained in paragraph Third of the complaint herein. Copies of the summons and complaint herein are hereto attached and made a part of this petition.

Third. That the defendant, Central Trust Company of New York, Farmers Loan and Trust Company and Metropolitan Trust Company of the City of New York are, and at the time of the commencement of this action were, and each of them was, a corporation duly organized and existing under and by virtue of the laws of the State of New York.

That none of said defendants, Central Trust Company of New York, Farmers Loan and Trust Company and Metropolitan Trust Company of the City of New York, are necessary or indispensable parties to this action, and the complaint does not show that there is any controversy between the plaintiff and the said defendants Central Trust Company of New York, Farmers' Loan and Trust Com-

pany and Metropolitan Trust Company of The City of New York.

59 Fourth. That the amount in dispute in this action exceeds, exclusive of interest, costs and expenses, two thousand dollars.

Fifth. That the defendants have a good and sufficient defence herein.

Sixth. That your petitioners have and present herewith a good and sufficient surety for their entering in the Circuit Court of the United States for the Eastern District of New York, on the first day of its next session, a copy of the record of this action, and for paying all costs that may be awarded by the said Circuit Court of the United States if said Court shall hold that this action was unlawfully or improperly removed thereto.

Seventh. That your petitioners have been served with copies of the summons and complaint in this action, and the defendants Olcott and Central Trust Company have served upon the attorneys for the plaintiff their notices of appearance in this action, but that the time of none of the defendants in this action to answer, plead or otherwise move to the complaint herein has expired, and that your petitioners have not filed or served any answer or in any way pleaded to the complaint herein.

Eighth. That no service of the summons and complaint in this action has been made upon the defendant Houston and Texas Central Railway Company.

Wherefore, your petitioners pray that this Honorable Court proceed no further herein except to accept the said surety and

60 bond, and to cause the record herein to be removed to the said Circuit Court of the United States for the Eastern District of New York.

Dated March 5th, 1908.

SOUTHERN PACIFIC COMPANY,
[SEAL.] By A. K. VAN DEVENTER, *Treasurer.*
THE HOUSTON AND TEXAS CENTRAL RAILROAD COMPANY,
[SEAL.] By A. K. VAN DEVENTER, *Treasurer.*

JOLINE, LARKIN & RATHBONE,
Solicitors for Petitioners.

FREDERIC P. OLCOTT,
By JOLINE, LARKIN & RATHBONE,
His Attorneys.

61 STATE OF NEW YORK,
County of New York:

A. K. Van Deventer being duly sworn deposes and says, that he is an officer, to wit, the Treasurer of Southern Pacific Company, one of the petitioners named in the foregoing petition; that he has read the said petition and knows the contents thereof; that the same is

true to the knowledge of deponent except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

That all of the petitioners are united in interest herein.

A. K. VAN DEVENTER.

Sworn to before me this 5th day of March, 1908.

[SEAL.] (Sd.) CHARLES FRANKLIN,
Notary Public, County of New York.

Commission expires March 30, 1908.

STATE OF NEW YORK,
County of New York, ss:

Arthur H. Van Brunt being duly sworn, says that he is a member of Joline, Larkin & Rathbone, Solicitors for Frederic P. Olcott, one of the petitioners herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

62 That the sources of deponent's knowledge and the grounds of his belief are the summons and complaint in this action, and various conversations and correspondence with the officers of the petitioners Southern Pacific Company and The Houston and Texas Central Railroad Company.

That the reason this verification is made by deponent and not by the petitioner Frederic P. Olcott is because the said Frederic P. Olcott is a citizen and resident of the State of New Jersey, and is not now within the State of New York.

(Sgd.) ARTHUR H. VAN BRUNT.

Sworn to before me this 5th day of March, 1908.

[SEAL.] FRANCIS L. MADDEN,
Notary Public, Westchester Co., N. Y.

Certificate Filed in N. Y. Co.

STATE OF NEW YORK,
County of New York, ss:

A. K. Van Deventer being duly sworn, deposes and says, that he is an officer, to wit: the —— of the Houston and Texas Central Railroad Company, one of the petitioners named in the foregoing petition; that he has read the said petition and knows the contents thereof; that the same is true to the knowledge of deponent except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

That all of the petitioners are united in interest herein.

A. K. VAN DEVENTER.

Sworn to before me this 5th day of March, 1908.

[SEAL.] CHARLES FRANKLIN,
Notary Public, County of New York.

Commission expires March 30, 1908.

63 Know all men by these presents, That the Southern Pacific Company, a Kentucky Corporation, as principal, and National Surety Company, a New York Corporation, having an office and principal place of business at No. 115 Broadway, Borough of Manhattan, in the City of New York, and State of New York, as Surety, are held and firmly bound unto Walter B. Lawrence in the penal sum of Five Hundred Dollars, for the payment whereof well and truly to be made unto the said Walter B. Lawrence, his heirs, representatives and assigns, said principal and surety bind themselves, their successors and assigns, jointly and severally, firmly by these presents:

Upon these conditions: Southern Pacific Company, Frederick P. Olcott and The Houston & Texas Central R. R. Company, having petitioned the Supreme Court of the State of New York, held in and for the County of Queens for the removal of a certain cause therein pending, wherein the said Walter B. Lawrence is the plaintiff and the said Southern Pacific Company and others are the defendants, to the Circuit Court of the United States, for the Eastern District of New York.

Now, if the said Southern Pacific Company, Frederick P. Olcott and The Houston & Texas Central R. R. Company, shall enter in said Circuit Court of the United States on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and virtue.

In witness whereof, the said Southern Pacific Company and National Surety Company, have caused their corporate seals
64 to be hereto affixed, and these presents to be signed by their proper officers thereunto duly authorized, on the 5th day of March, 1908.

SOUTHERN PACIFIC COMPANY,
[SEAL.] By A. K. DEVENTER, *President.*
Attest:
ALEX. MILLAR, *Secretary.*
NATIONAL SURETY COMPANY,
[SEAL.] By JOEL RATHBONE, *Vice-President.*
Attest:
WM. A. THOMPSON,
Ass't Secretary.

In the Presence of
CHARLES FRANKLIN.

STATE OF —— ——,
County of —— ——:

On the fifth day of March, in the year 1908, before me personally came A. K. Van Deventer, to me known who being by me duly sworn did depose and say that he resides in Elizabeth, New Jersey; that he is the Treasurer of the Southern Pacific Company, the corporation described in and who executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

[SEAL.] CHARLES FRANKLIN,
Notary Public, County of New York.

Commission expires March 30, 1908.

65 STATE OF NEW YORK,
County of New York, ss:

On this 5th day of March, 1908, before me personally appeared Joel Rathbone, Vice-President of the National Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the County of New York; that he is the Vice-President of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said Company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company, and that he signed said instrument as Vice-President of said Company by like authority; and that the liabilities of said Company do not exceed its assets, as ascertained in the manner provided in Section 3, Chapter 720, of New York Session laws of 1893. And the said Joel Rathbone further said that he is acquainted with Wm. A. Thompson and knows him to be the Assistant Secretary of said Company; that the signature of the said Wm. A. Thompson subscribed to the said instrument is in the genuine handwriting of the said Wm. A Thompson and was thereto subscribed by the like order of the said Board of Directors and in the presence of him, the said Vice-President.

JERROLD S. MULLEN,
Notary Public, No. 369, for County of New York.

Certificate filed in Kings, Queens, Richmond and Westchester Counties.

Copy of By-Law.

Be it remembered, That at a regular meeting of the Board of Directors of the National Surety Company, duly called and held on the first day of May, 1906, a quorum being present, the following By-Law was adopted:

"ARTICLE XIII. SEC. 1. Signatures Required.—All bonds, recog-

"nizances, contracts of indemnity, policies of insurance and all "other writings obligatory in the nature thereof, shall be signed "by the President, the Vice President, Second Vice President, "Third Vice President, or Fourth Vice President, a Resident Vice "President, or Attorney-in-fact, and except when signed by an "Attorney-in-fact, shall have the seal of the Company affixed "thereto duly attested by the Secretary, an Assistant Secretary, or "Resident Assistant Secretary. The Vice President, Second Vice "President, Third Vice President, Fourth Vice President, and Resi-"dent Vice President shall each have authority to sign such instru-"ments, whether the President be absent, or incapacited or not; "and the Assistant Secretaries and Resident Assistant Secretaries "shall each have authority to seal and attest such instruments, "whether the Secretary be absent, or incapacitated or not. All
"such instruments executed as herein provided shall be as
66 "binding upon the Company as if the same were signed by
"the President, and duly sealed and attested by the Secre-
"tary."

STATE OF NEW YORK,
County of New York, ss:

I, Wm. A. Thompson, Assistant Secretary of the National Surety Company, have compared the foregoing By-Law with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original By-Law.

Given under my hand and the seal of the Company in the County of New York, this 5th day of March, 1908.

WM. A. THOMPSON,
Assistant Secretary.

Endorsed: Record on Removal. Filed March 16, 1908.

67 United States Circuit Court, Eastern District of New York.

WALTER B. LAWRENCE, Suing on Behalf of Himself and Other Stockholders, etc., Plaintiff,
vs.
SOUTHERN PACIFIC COMPANY, FREDERICK P. OLCOTT et als., Defendants.

Rule.

This action having been originally begun in the Supreme Court of the State of New York in and for the County of Queens, and having been duly removed by the defendants to the Circuit Court of the United States for the Eastern District of New York, and a certified copy of the record in said Supreme Court having been this day filed in this court by Joline, Larkin & Rathbone, attorneys for the defendants, Southern Pacific —, F. P. Olcott, and The Houston

& Texas R. R. Co., with offices at No. 54 Wall St., Borough of Manhattan, City of New York, now on motion of Joline, Larkin & Rathbone, attorneys for the above named defendants, it is

Ordered that this action proceed in this court in the same manner as if at had been originally begun herein, and that the appearance of Joline, Larkin & Rathbone as attorneys for the Southern Pacific Co., F. P. Olcott, and The Houston & Texas R. R. Co., three of
68 the defendants, be and the same is hereby noted.

Dated, Borough of Brooklyn, City of New York, this 16th day of March, 1908.

69 United States Circuit Court, Eastern District of New York.

WALTER B. LAWRENCE, Suing on Behalf of Himself and Other Stockholders of the Houston & Texas Central Railway Company Similarly Situated Who May Come in and Contribute to the Expenses of this Action, Plaintiff,

against

SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL Trust Company of New York, Farmers Loan & Trust Company, Metropolitan Trust Company of the City of New York, and Houston & Texas Central Railway Company, Defendants.

SIRS: Please take notice that upon the record in the above entitled action filed in the office of the Clerk of the United States Circuit Court for the Eastern District of New York, the undersigned will move this Court at a term thereof to be held in the United States Court House and Post Office Building in the Borough of Brooklyn, City of New York, on the 20th day of March, 1908, at three o'clock in the afternoon of said day, or as soon thereafter as counsel can be heard, for an order to remand the above entitled action to the Supreme Court of New York, Queens County, from whence it came, and for such other and further relief as to the Court may seem just.

Dated March 16, 1908.

DITTENHOEFER, GERBER & JAMES,
Attorneys for Plaintiff.

Office & P. O. Address, 96 Broadway, Borough of Manhattan, New York City.

To Messrs. Joline, Larkin & Rathbone, Attorneys for Defendant Olcott, 54 Wall Street, Borough of Manhattan, New York City.

Endorsed: Notice to remand.

70 United States Circuit Court, Eastern District of New York.

WALTER B. LAWRENCE
against
SOUTHERN PACIFIC COMPANY and Others.

Nov. 25, 1908.

Battle & Marshall, attorneys for plaintiff; David Gerber and H. Snowden Marshall, of counsel.

Joline, Larkin & Rathbone, attorneys for The Houston & Texas Central Railroad Company; Arthur H. Van Brunt, of counsel.

CHATFIELD, *J.*:

A long statement of facts on the present application seems unnecessary. Certain litigation has been had in the state courts, resulting in the dismissal of the complaint. MacArdell v. Olcott, 189 N. Y. 368 82 N. E. 181. A second action, upon allegations growing out of the same state of facts, but setting forth a different cause of action, has been brought in the Supreme Court of the county of Queens, in the state of New York, by Walter B. Lawrence, on behalf of himself and other stockholders of the Houston Texas Central Railway Company, against Southern Pacific Company, Frederic P. Olcott, Central Trust Company of New York, Farmers' Loan & Trust Company, Metropolitan Trust Company of the City of New York, the Houston & Texas Central Railroad Company, and Houston & Texas Central Railway Company. Before answer the defendants Southern Pacific Company, Frederic P. Olcott, and the
71 Houston & Texas Central Railroad Company applied for an order of removal, upon an affidavit showing that the Southern Pacific Company was a corporation of the state of Kentucky and a citizen and resident of that state, that the defendant Frederic P. Olcott, was a citizen and resident of the state of New Jersey, and that the Houston & Texas Central Railroad Company and the Houston & Texas Central Railway Company were corporations of the state of Texas and citizens and residents therein, that the defendants Central Trust Company, Farmers' Loan & Trust Company, and the Metropolitan Trust Company of the City of New York were all corporations of the state of New York, and that these last three named trust companies are not necessary or indispensable parties to the action. The other allegations of the affidavit upon which the order of removal was obtained are not called into question, and seem to comply with the requirements of the statute. As the result of this application an order of removal was entered in the Supreme Court of the county of Queens, and the record was filed in the Circuit Court of the United States for the Eastern District of New York, upon the 16th day of March, 1908. The present motion to remand was brought on before this court upon the 20th day of March, 1908, and was duly argued and submitted.

The plaintiff contends upon the motion to remand that he seeks to impress a trust or obligation to convey certain lands upon both the de-

fendant Olcott and the three New York trust company defendants, which trust companies hold title to these lands for the protection of certain mortgage bondholders. The defendants claim, however, that the defendant Olcott is apparently only given a reversion in the equity redemption, as to which the right to a trust exists if
72 the plaintiff be entitled to any such right. The person in possession of land, of which it is sought to obtain possession, is a necessary party to any such action. Construction Co. v. Cane Creek, 155 U. S. 283, 15 Sup. Ct. 91, 39 L. Ed. 152. It is apparent that an action brought by the plaintiff, a resident of Queens county, in the state of New York, could not be brought against the Central Trust Company, a resident of the county of New York, in the same state, in company with other defendants, in the courts of the United States, under a claim of diversity of citizenship if the trust company is an indispensable party. The defendants who filed the petition for removal in the state court, it will be noted, included only Mr. Olcott, who is admitted by all parties to be both necessary and indispensable as a party defendant, and the Southern Pacific Company and the Houston & Texas Central Railroad Company, who are admittedly not residents of the state of New York. These defendants have alleged that the Central Trust Company and the other New York trust companies are not necessary or indispensable parties. The notice of this present motion was directed to and served upon the attorneys for the defendants who petitioned for removal; but the Central Trust Company of New York, together with the two other trust companies, have not appeared by attorney in the action nor upon any of the motions. The plaintiff is insisting upon his right to sue these absent defendants, and to ask, as he claims, affirmative relief against them, and the complaint, so far as the record in this case is concerned, is the only paper from which this court can determine the present motion. The decision in the MacArdell Case may throw some light upon the holding of the New York courts with reference to the agreements and deeds involved herein, but the question of the interpretation of the present complaint must be
73 passed upon independently, and there is nothing in the MacArdell Case making any of these questions res adjudicata, so far as the present parties are concerned.

The defendants who caused the removal of this action into the United States court have laid great stress upon the point that a denial of the present motion and the retention of the case in the United States court will not mean the discontinuance of the action as to those defendants, and that they may be proper parties, and may ultimately be subjected to any orders of the court in this action. But this contention loses sight of the fact that they have not yet appeared, and that it is impossible to now determine whether a motion to discontinue as to them would or must be granted if they are neither necessary nor indispensable. Certainly, without their appearance and presence, it is impossible to determine whether they will contest their being considered proper parties, and the whole question of retaining them in the suit depends primarily upon whether they are in default, after proper service.

The plaintiff has also raised the technical objection to the petition on removal, upon the authority of Fife v. Whittell (C. C.) 102 Fed. 537, that the allegations show affirmatively the residence of the defendants in question, but contain no statement that they are nonresidents of the state of New York. Under the present policy of the United States courts, as expressed by Kinney v. Columbia Savings, etc. Ass'n, 191 U. S. 78, 24 Sup. Ct. 30, 48 L. Ed. 103, In re Moore, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, and Western Loan & Savings Co. v. Butte & Boston Consolidated Mining Co. 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101, it would seem
74 that Zebert v. Hunt (C. C.) 108 Fed. 449, states the better rule, and that allegations showing nonresidence are sufficient for the retention of jurisdiction, even if the direct statement of nonresidence is not set forth in the words of the statute.

The principal opportunity for argument would seem to be the use of the word "indispensable" as distinguished from "proper" or "necessary" parties. In the case of Rogers v. Penobscot Mining Co., 154 Fed. 606, 83 C. C. A. 380, it has been held that an indispensable party is one whose interest in the subject-matter of the controversy is such that a final decree cannot be rendered between the other parties to the suit without radically and injuriously affecting his interest, or without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. In the case of Geer v. Mathieson Alkali Works, 190 U. S. 428, 23 Sup. Ct. 807, 47 L. Ed. 1122, an order of removal was sustained, and an application to remand refused; the court holding that the action was severable as to the parties who were claimed to be not indispensable, and that any relief that might be had by the plaintiff against those defendants who had not joined in the order of removal was merely the resultant of relief against the indispensable defendants, and would follow whether the action included those nominal parties or whether it did not. The present case is very similar.

In the case at bar no relief is asked against the three New York trust companies, except that they be declared not to have any beneficial interest or ownership in the lands conveyed to them as security for the mortgage bonds. It is apparent, from an examination of the deed of trust to them, that they took solely as trustees. The allegations of the complaint in this respect are not dis-
75 puted by the defendants who have appeared, and these trust companies as trustees have a title paramount to that claimed by the other defendants, or to that which the plaintiff demands shall be conveyed to him. The person having a paramount title is not a necessary or indispensable party, and, if the action had remained in the state court and the trust companies had failed to answer, no relief could have been asked of them, and no judgment could have been entered affecting them, except in so far as such a judgment recognized the validity of their title as trustee.

An examination of the records of this court shows that after removal these trust companies have neither joined in the motion to remand nor appeared in the action, and (if they were duly

served) are now in default, and the allegations of the complaint are therefore admitted, so far as they are concerned. Under such circumstances it seems necessary to hold that they are not indispensable parties either to the trial of the action or the rendering of the judgment. If they resist the carrying out of the decree of the court, if a decree be ultimarely entered in favor of the plaintiff, such resistance would have to be by affirmative action on their part, and if they are carried as parties in the action, although not indispensable, especially if they remain in default, no greater relief could be given against them (provided they claim under a title paramount) than if they were not parties and holding in the same way. On the contrary, such relief as can be granted can be enforced in the action as it stands at present, assuming that they are proper parties and have been made parties, even if they be regarded as not indispensable.

It has been suggested upon the argument and in the briefs that, if jurisdiction is retained by this court and the action is not
76 remanded, great confusion and perhaps severe loss may result from the freedom of action which will thus be given to these three trust companies. For the reasons just stated, this objection does not seem to be of sufficient weight, and inasmuch as no appeal can be taken from an order remanding, which is in the discretion of the court, while, on the contrary, an order denying the motion to remand may be reviewed on appeal, the case would seem to be one in which the jurisdiction of this court should be retained and the motion to remand denied.

(Signed) THOMAS I. CHATFIELD, *U. S. J.*

77 At a stated term of the United States Circuit Court for the Eastern District of New York, held at the Post Office building, in said District, in the Borough of Brooklyn, County of Kings, on the 1st day of December, 1908.

Present: Hon. Thomas I. Chatfield, District Judge, holding the Court.

WALTER B. LAWRENCE, Suing on Behalf of Himself and Other Stockholders of the Houston and Texas Central Railway Company Similarly Situated Who May Come in and Contribute to the Expenses of This Action, Plaintiff,

against

SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL Trust Company of New York, Farmers' Loan and Trust Company, Metropolitan Trust Company of the City of New York, The Houston and Texas Central Railroad Company, and Houston and Texas Central Railway Company, Defendants.

Order.

This cause having been removed to the United States Circuit Court for the Eastern District of New York, by the defendants,

Southern Pacific Company, Frederic P. Olcott and The Houston and Texas Central Railroad Company, from the Supreme Court of the State of New York in and for Queens County, and plaintiff having moved this court to remand the cause to the Supreme Court, Queens County, from whence it came;

Now, after hearing David Gerber and H. Snowden Marshall, counsel for the plaintiff in support of said motion, and Arthur H. Van Brunt, counsel for the defendants, Southern Pacific Company, Frederic P. Olcott and The Houston and Texas Cen-
78 tral Railroad Company in opposition thereto, and due deliberation having been had, and upon all the papers and proceedings heretofore had herein, it is

Ordered that the said motion be, and the same hereby is, in all respects denied. THOMAS I. CHATFIELD, *U. S. J.*

Endorsed: Order. Filed and entered December 1st, 1910.

79 Circuit Court of the United States, Eastern District of New York.

WALTER B. LAWRENCE, etc., Complainant,
against
THE SOUTHERN PACIFIC COMPANY, CENTRAL TRUST CO. OF N. Y., and Others, Defendants.

To the Clerk of the above named Court.

SIR: Please note the appearance of the undersigned as solicitors for and of counsel with the defendant Central Trust Company of New York in the above entitled cause.

Dated Dec. 11, 1908.

Yours etc. JOLINE, YARKIN & RATHBONE.

Office and P. O. Address, 54 Wall St., Borough of Manhattan, City of New York.

Endorsed: Notice of Appearance; filed and entered December 11, 1908.

80 Circuit Court of the United States, Eastern District of New York.

WALTER B. LAWRENCE, etc., Complainant,
against
THE SOUTHERN PACIFIC COMPANY, THE FARMERS' LOAN AND TRUST COMPANY, and Others, Defendants.

To the Clerk of the above named Court.

SIR: Please note the appearance of the undersigned as solicitors for and of counsel with the defendant The Farmers' Loan and Trust Company in the above entitled cause.

Dated, Dec. 14th, 1908.

TURNER, ROLSTON & HORAN,
Office and P. O. Address, 22 William Street,
Borough of Manhattan, City of New York.

Endorsed: Notice of appearance for Farmers' Loan & Trust Co. Filed and entered December 14, 1908.

81 United States Circuit Court for the Eastern District of New York.

WALTER B. LAWRENCE, etc., Plaintiff,
against
SOUTHERN PACIFIC COMPANY and Others, Defendants.

Please to enter our appearance as attorneys for the defendant Metropolitan Trust Company of the City of New York in the above entitled cause.

PARSONS, CLOSSON & McILVAINE,
Attorneys for Defendant Metropolitan Trust Company of the City of New York, 52 William Street, Borough of Manhattan, New York City, New York.

Dated, December 15, 1908.

To the Clerk of the Circuit Court of the United States for the Eastern District of New York.

Endorsed: Notice of Appearance; filed and entered the 15th day of December, 1908.

82 Circuit Court of the United States, Eastern District of New York.

In Equity.

WALTER B. LAWRENCE, Suing on Behalf of Himself and Other Stockholders of the Houston & Texas Central Railway Company Similarly Situated Who May Come in and Contribute to the Expenses of this Action, Plaintiff,
against
SOUTHERN PACIFIC COMPANY, FREDERICK P. OLCOTT, CENTRAL Trust Company of New York, Farmers' Loan & Trust Company, Metropolitan Trust Company of the City of New York, The Houston & Texas Central Railroad Company, and Houston & Texas Central Railway Company, Defendants.

The Joint and Several Plea of the Southern Pacific Company, Frederick P. Olcott, and The Houston & Texas Central Railroad Company, Defendants in the Above Entitled Cause, to the Bill of Complaint Herein.

The defendants respectively, by protestation, not confessing or acknowledging all or any of the matters and things in and by said bill of complaint set forth and alleged to be true in such manner

and form as the same are thereby and therein set forth and alleged, for plea to the whole of said bill say:

That Houston & Texas Central Railway Company is a corporation organized and existing under the laws of the State of Texas, and is a citizen and resident of the State of Texas, and a non-resident of the Eastern District of New York; that the said Houston & Texas Central Railway Company is named as a defendant in the bill of Complaint herein, and that this Court has no jurisdiction of
83 said company; that said Houston & Texas Central Railway Company is, as appears by the bill of complaint herein, a proper, necessary and indispensable party to this suit, and that said Railway Company has not been and cannot be brought by process within the jurisdiction of this Court, and has not subjected itself to the jurisdiction of this Court by voluntary appearance or otherwise; and that, in the absence and without the presence of the said Houston & Texas Central Railway Company, no full, complete or final determination of this suit or controversy can be had, nor complete or final justice be done or decreed; all of which matters and things these defendants do aver to be true and plead in bar to the bill of complaint herein, and humbly pray the judgment of this Honorable Court whether they should be compelled to make any other or further answer to the said bill, and pray to be hence dismissed, with their costs and charges in that behalf most wrongfully sustained.

JOLINE, LARKIN & RATHBONE,
Solicitors for Defendants Southern Pacific Company, Frederick P. Olcott, and The Houston & Texas Central Railroad Company, 54 Wall Street, New York City.

ARTHUR H. VAN BRUNT,
Of Counsel.

84 I hereby certify that in my opinion the foregoing plea is well founded in point of law.

(S'g'd) ARTHUR H. VAN BRUNT,
Of Counsel for Defendants Southern Pacific Company, Frederick P. Olcott, and The Houston & Texas Central Railroad Company.

UNITED STATES OF AMERICA,
Southern District of New York,
County of New York, ss:

Alex Millar being duly sworn, says that he is an officer, to wit, the Secretary of Southern Pacific Company, one of the above named defendants; that the foregoing plea is true in point of fact and is not interposed for delay.

(S'g'd) ALEX. MILLAR.

Subscribed and sworn to before me this 2nd day of December, 1908.

[SEAL.] (S'g'd) CHARLES FRANKLIN,
Notary Public, New York County.

Commission expires March 31st, 1910

Endorsed: Plea of Southern Pacific Company and others. Filed December 3, 1908.

85 Circuit Court of the United States, Eastern District of New York.

In Equity.

WALTER B. LAWRENCE, Suing on Behalf of Himself and Other Stockholders of the Houston & Texas Central Railway Company Similiarly Situated Who May Come in and Contribute to the Expenses of this Action, Plaintiff.

against

SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL Trust Company of New York, Farmers' Loan & Trust Company, Metropolitan Trust Company of the City of New York, The Houston & Texas Central Railroad Company, and Houston & Texas Central Railway Company, Defendants.

The Plea of the Central Trust Company of New York, one of the Defendants in the Above Entitled Cause, to the Bill of Complaint Herein.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in and by said bill of complaint set forth and alleged to be true in such manner and form as the same are thereby and therein set forth and alleged, for plea to the whole of said bill says:

That Houston & Texas Central Railway Company is a corporation organized and existing under the laws of the State of Texas, and is a citizen and resident of the State of Texas, and a non-resident of the Eastern District of New York; that the said Houston & Texas Central Railway Company is named as a defendant in the bill of complaint herein, and that this Court has no jurisdiction
86 of said company; that said Houston & Texas Central Railway Company is, as appears by the bill of complaint herein, a proper, necessary and indispensable party to this suit, and that said Railway Company has not been and cannot be brought by process within the jurisdiction of this Court, and has not subjected itself to the jurisdiction of this Court by voluntary appearance or otherwise; and that, in the absence and without the presence of the said Houston & Texas Central Railway Company, no full, complete or final determination of this suit or controversy can be had, nor complete or final justice be done or decreed; all of which matters

and things this defendant does aver to be true and pleads in bar to the bill of complaint herein, and humbly prays the judgment of this Honorable Court whether it should be compelled to make any other or further answer to the said bill, and prays to be hence dismissed, with its costs and charges in that behalf most wrongfully sustained.

JOLINE, LARKIN & RATHBONE,
Solicitors for Defendant Central Trust Company of New York, 54 Wall Street, New York City.

ARTHUR H. VAN BRUNT,
Of Counsel.

87 I hereby certify that in my opinion the foregoing plea is well founded in point of law.

(Signed) ARTHUR H. VAN BRUNT,
Of Counsel for Defendant Central Trust Company of New York.

UNITED STATES OF AMERICA,
Southern District of New York,
County of New York, ss:

E. Francis Hyde, being duly sworn, says that he is an officer, to wit, Vice President of the Central Trust Company of New York, one of the above defendants; that the foregoing plea is true in point of fact and is not interposed for delay.

(Signed) E. FRANCIS HYDE.

Subscribed and sworn to before me this 11th day of December, 1908.

[SEAL.] FRANCIS L. MADDEN,
Notary Public, Westchester Co., N. Y.

Certificate filed in N. Y. Co.

Endorsed: Plea of Central Trust Co. of N. Y. Filed December 15, 1908.

88 Circuit Court of the United States, Eastern District of New York.

In Equity.

WALTER B. LAWRENCE, Suing on Behalf of Himself and Other Stockholders of the Houston and Texas Central Railway Company Similarly Situated Who May Come in and Contribute to the Expenses of this Action, Plaintiff,

against

SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL Trust Company of New York, Farmers' Loan and Trust Company, Metropolitan Trust Company of the City of New York, The Houston and Texas Railroad Company, and Houston and Texas Central Railway Company, Defendants.

The plea of The Farmers' Loan and Trust Company, One of the Above-named Defendants, to the Bill of Complaint Herein.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in and by said bill of complaint set forth and alleged to be true in such manner and form as the same are thereby and therein set forth and alleged, for plea to the whole of said bill says:

89 That Houston and Texas Central Railway Company is a corporation organized and existing under the laws of the State of Texas and is a citizen and resident of the State of Texas and a non-resident of the Eastern District of New York; that the said Houston and Texas Central Railway Company is named as a defendant in the bill of complaint herein, and that this Court has no jurisdiction of said Company; that said Houston and Texas Central Railway Company is, as appears by the bill of complaint herein, a proper, necessary and indispensable party to this suit; that as this defendant is informed and believes the said railway company has not been brought by process within the jurisdiction of this Court and has not subjected itself to the jurisdiction of this Court by voluntary appearance or otherwise; that as this defendant is advised and therefore alleges, said railway company cannot be brought by process within the jurisdiction of this court; that, in the absence and without the presence of the said Houston and Texas Central Railway Company no full, complete or find determination of this suit or controversy can be had, nor complete or final justice be done or decreed; all of which matters and things this defendant does aver to be true as aforesaid and pleads in bar to the bill of complaint herein and humbly prays the judgment of this Honorable Court whether it should be compelled to make any other or further answer to the said bill, and prays to be hence dismissed with

90 its costs and charges in that behalf most wrongfully sustained.

TURNER, ROLSTON & HORAN,
Solicitors for Defendant The Farmers' Loan and Trust Company, 22 William Street, Borough of Manhattan, City of New York, N. Y.

JAMES F. HORAN,
Of Counsel.

I hereby certify that in my opinion the foregoing plea is well founded in point of law.

JAMES F. HORAN,
Of Counsel for the Defendant The Farmers' Loan and Trust Company.

UNITED STATES OF AMERICA,
Southern District of New York, County of New York, ss:

Edwin S. Marston, being duly sworn, says that he is an officer, to wit, the President of The Farmers' Loan and Trust Company, the above-named defendant; that in point of fact the fore-
91 going plea is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true, and that the foregoing plea is not interposed for delay.

E. S. MARSTON.

Subscribed and sworn to before me, this Fourth day of December, 1908.

W. B. CARDOZO,
Notray Public, No. 20 *and* 582,
New York County.

Certificate filed in New York County Register's Office.

Endorsed: Plea of The Farmers' Loan and Trust Company. Filed December 14, 1908.

92 Circuit Court of the United States, Eastern District of New York.

WALTER B. LAWRENCE, Suing on Behalf of Himself and Other Stockholders of the Houston & Texas Central Railway Company Similarly Situated Who May Come in and Contribute to the Expenses of this Action, Plaintiff,

against

SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL Trust Company of New York, Farmers' Loan & Trust Company, Metropolitan Trust Company of the City of New York, The Houston & Texas Central Railroad Company and Houston & Texas Central Railway Company, Defendants.

Plea of Metropolitan Trust Company of the City of New York, One of the Defendants in the Above Entitled Cause, to the Bill of Complaint Herein.

The defendant, Metropolitan Trust Company of The City of New York, by protestation, not confessing or acknowledging all or any of the matters and things in and by said bill of complaint set forth and alleged to be true in such manner and form as the same are

thereby and therein set forth and alleged, for plea to the whole of said bill says:

That Houston & Texas Central Railway Company is a corporation organized and existing under the laws of the State of Texas, and is a citizen and resident of the State of Texas, and a non-
93 resident of the Eastern District of New York; that the said Houston & Texas Central Railway Company is named as a defendant in the bill of complaint herein, and that this Court has no jurisdiction of said company; that said Houston & Texas Central Railway Company is, as appears by the bill of complaint herein, a proper, necessary and indispensable party to this suit, and that said Railway Company has not been and cannot be brought by process within the jurisdiction of this Court, and has not subjected itself to the jurisdiction of this Court by voluntary appearance or otherwise; and that, in the absence and without the presence of the said Houston & Texas Central Railway Company, no full, complete or final determination of this suit or controversy can be had, nor complete or final justice be done or decreed; all of which matters and things this defendant does aver to be true and pleads in bar to the bill of complaint herein, and humbly prays the judgment of this Honorable Court whether it should be compelled to make any other or further answer to the said bill, and prays to be hence dismissed, with its costs and charges in that behalf most wrongfully sustained.

PARSONS, CLOSSON & McILVAINE,
Solicitors for Defendant Metropolitan Trust Company of the City of New York.

No. 52 William Street, New York City.

TOMPKINS McILVAINE,
Of Counsel.

94 I hereby certify that in my opinion the foregoing plea is well founded in point of law.

TOMPKINS McILVAINE,
Of Counsel for Defendant Metropolitan Trust Company of the City of New York.

UNITED STATES OF AMERICA,
Southern District of New York, County of New York, ss:

Beverly Chew, being duly sworn, says, that he is an officer, to wit, the 2d Vice President of the Metropolitan Trust Company of the City of New York, one of the above named defendants; that the foregoing plea is true in point of fact and is not interposed for delay.

BEVERLY CHEW.

Subscribed and sworn to before me this 15th day of December, 1908.

[SEAL.]

A. E. VOGLER,
Notary Public, Kings County, N. Y.

Certificate filed in New York County.

Endorsed: Plea of Metropolitan Trust Company. Filed December 15, 1908.

95 Circuit Court of the United States, Eastern District of New York.

WALTER B. LAWRENCE, Suing on Behalf of Himself and Other Stockholders of the Houston & Texas Central Railway Company Similarly Situated Who May Come in and Contribute to the Expenses of this Action, Complainant,

against

SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL Trust Company of New York, Farmers' Loan & Trust Company, Metropolitan Trust Company of the City of New York, The Houston & Texas Central Railroad Company and Houston & Texas Central Railway Company, Defendants.

The Replication of the Above Named Complainant to the Joint and Several Plea of the Above Named Defendants, Southern Pacific Company, Frederic P. Olcott and Houston & Texas Central Railroad Company.

This replicant, saving and reserving to himself all and all manner of advantage of exceptions which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the plea of said defendants, for replication thereunto says that he does and will ever maintain and prove his said bill to be true, certain and sufficient in the law to be pleaded unto by said defendants, and that the plea of said defendants is very uncertain, evasive and insufficient in the law to be replied unto by this replicant: without that, that any other matter or thing in the said plea contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied to, confessed or avoided, traversed or de-

96 nied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court will direct, and humbly as in and by his said bill he has already prayed.

DITTENHOEFER, GERBER & JAMES,
Solicitors for Complainant, 96 Broadway, New York City.

Endorsed: Replication to Plea of Southern Pacific Co. et al. Filed March 25, 1909.

97 Circuit Court of the United States, Eastern District of New York.

WALTER B. LAWRENCE, Suing on Behalf of Himself and Other Stockholders of the Houston & Texas Central Railway Company Similarly Situated Who May Come in and Contribute to the Expenses of this Action, Complainant,

against

SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL Trust Company of New York, Farmers' Loan & Trust Company, Metropolitan Trust Company of the City of New York, The Houston & Texas Central Railroad Company and Houston & Texas Central Railway Company, Defendants.

The Replication of the Above Named Complainant to the Plea of the Above Named Defendant Central Trust Company of New York.

This replicant, saving and reserving to himself all and all manner of advantage of exceptions which may be had and taken to the manifold errors, uncertainties and insufficiencies of the plea of said defendant, for replication thereunto says that he does and will ever maintain and prove his said bill to be true, certain and sufficient in the law to be pleaded unto by said defendant, and that the plea of said defendant is very uncertain, evasive and insufficient in the law to be replied unto by this replicant without that, that any other matter or thing in the said plea contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied to, confessed or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court will direct, and
98 humbly as in and by his said bill he has already prayed.

DITTENHOEFER, GERBER & JAMES,
Solicitors for Complainant.

Endorsed: Replication to Plea of Central Trust Co. of New York. Filed March 25, 1909.

99 Circuit Court of the United States, Eastern District of New York.

WALTER B. LAWRENCE, Suing on Behalf of Himself and Other Stockholders of The Houston & Texas Central Railway Company Similarly Situated Who May Come in and Contribute to the Expenses of this Action, Complainant,

against

SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL Trust Company of New York, Farmers' Loan & Trust Company, Metropolitan Trust Company of the City of New York, The Houston & Texas Central Railroad Company, and Houston & Texas Central Railway Company, Defendants.

The Replication of the Above-named Complainant to the Plea of the Above-named Defendant, Farmers' Loan & Trust Company.

This replicant, saving and reserving to himself all and all manner of advantage of exceptions which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the plea of said defendant, for replication thereunto says that he does and will ever maintain and prove his said bill to be true, certain and sufficient in the law to be pleaded unto by said defendant, and that the plea of said defendant is very uncertain, evasive and insufficient in the law to be replied unto by this replicant: without that, that any other matter or thing in the said plea contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied to, confessed or avoided, traversed or denied, is true; all of which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court will
100 direct, and humbly as in and by his said bill he has already prayed.

DITTENHOEFER, GERBER & JAMES,
Solicitors for Complainant, 96 Broadway, New York City.

Endorsed: Replication to Plea of Farmers Loan and Trust Co., Filed March 25, 1910.

101 Circuit Court of the United States, Eastern District of New York.

WALTER B. LAWRENCE, Suing on Behalf of Himself and Other Stockholders of The Houston & Texas — Railway Company Similarly Situated Who May Come in and Contribute to the Expenses of this Action, Complainant,

against

SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL Trust Company of New York, Farmers' Loan & Trust Company, Metropolitan Trust Company of the City of New York, The Houston & Texas Central Railroad Company, and Houston & Texas Central Railway Company, Defendants.

The Replication of the Above-named Complainant to the Plea of the Above-named Defendant, Metropolitan Trust Company of the City of New York.

This replicant, saving and reserving to himself all and all manner of advantage of exceptions which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the plea of said defendant, for replication thereunto says that he does and will ever maintain and prove his said bill to be true, certain and sufficient in the law to be pleaded unto by said defendant, and that the plea of said defendant is very uncertain, evasive and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said plea contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied to, confessed or avoided, traversed or de-
102 nied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court will direct, and humbly as in and by his said bill he has already prayed.

DITTENHOEFER, GERBER & JAMES,
Solicitors for Complainant, 96 Broadway, New York City.

Endorsed: Replication to plea of Metropolitan Trust Co. Filed March 25, 1909.

103 United States Circuit Court, Eastern District of New York.

WALTER B. LAWRENCE, Suing on Behalf of Himself and Other Stockholders of The Houston and Texas Central Railway Company Similarly Situated Who May Come in and Contribute to the Expenses of this Action, Complainant,

against

SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL Trust Company of New York, Farmers' Loan and Trust Company, Metropolitan Trust Company of the City of New York, The Houston and Texas Central Railroad Company, and Houston and Texas Central Railway Company, Defendants.

SIRS: Please take notice, that upon the record in the above entitled action, filed in the Office of the Clerk of the United States

Circuit Court for the Eastern District of New York; upon the annexed affidavit of Walter B. Lawrence, and the papers therein mentioned, and the pleas interposed by the defendants herein, the undersigned will move this Court at a Term thereof to be held in the United States Court House in the Post Office Building in the Borough of Brooklyn, City of New York, on the 5" day of February 1909, at 3 o'clock in the afternoon of that day or as soon thereafter as counsel can be heard, for leave to renew the motion to remand the above entitled action to the Supreme Court of the State of New York, Queens County, from whence it came, and for an
104 order remanding the said action accordingly, on the ground and for the reason that the Supreme Court of the State of New York, where the action was originally brought, can acquire jurisdiction of this action over all the defendants, so that it may be tried upon its merits, whereas this Court, into which the cause has been removed by certain non-resident defendants, by reason of the plea interposed by the defendants (other than the Houston and Texas Central Railway Company) has not and cannot acquire jurisdiction of the defendant, the Houston and Texas Central Railway Company, and has not and cannot acquire jurisdiction of the action so that the same can be tried upon its merits, and that the purpose of removing the case from the State Court into this Court was to deprive the State Court of jurisdiction to try the case upon its merits, and to remove the cause into this Court, which cannot acquire jurisdiction of the Houston and Texas Central Railway Company and thus enable the said defendants to interpose a plea which will deprive this court from carrying the case upon its merits, and in that way prevent the complainant from obtaining a trial of his cause upon the merits, and for such other and further relief as to the court may seem just and proper.

Dated, New York, January — 1909.

Yours &c.,

DITTENHOEFER, GERBER & JAMES,
Attorneys for Complainant, Office & P. O. Address: 96 Broadway, Borough of Manhattan, City of New York.

To

Messrs. Joline, Larkin & Rathbone, Attorneys for Defendant Southern Pacific Company;

105 Messrs. Parsons, Closson & McIlvaine, Attorneys for Defendant Metropolitan Trust Company of New York;

Messrs. Turner, Rolston & Horan, Attorneys for Defendant, Farmers Loan and Trust Company.

106 United States Circuit Court, Eastern District of New York.

WALTER B. LAWRENCE, Suing on Behalf of Himself and Other Stockholders of the Houston and Texas Central Railway Company Similarly Situated Who May Come in and Contribute to the Expenses of this Action, Complainant,

against

SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL Trust Company of New York, Farmers Loan and Trust Company, Metropolitan Trust Company of the City of New York, The Houston and Texas Central Railroad Company, and Houston and Texas Central Railway Company, Defendants.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

WALTER B. LAWRENCE, being duly sworn deposes and says:

He is the complain-t herein, suing on behalf of himself and other stockholders of the Houston and Texas Central Railway Company.

This action was commenced on or about the 19th day of February, 1908 in the Supreme Court of the State of New York.

That deponent resides in the County of Queens, City and State of New York, and has resided there for years.

That service of the summons and complaint was effected upon the defendants, Southern Pacific Company, Frederick P. Olcott,
107 Central Trust Company of New York, Farmers' Loan and Trust Company, Metropolitan Trust Company of the City of New York and The Houston and Texas Central Railroad Company by person- service of the summons and complaint within the State of New York, and all of the said defendants duly appeared herein.

That on the 9th day of March, 1908, on the petition of the defendants, Southern Pacific Company, Houston and Texas Central Railroad Company, and Frederic P. Olcott, this suit was removed from the New York Supreme Court into this Court, on the ground that the said defendants were not residents of the State of New York, of which the plaintiff was such resident, and that there was, therefore, a diversity of citizenship, and there was a separable controversy between the said defendants removing the said cause, and the plaintiff.

That among other things, it was claimed by said defendants, as deponent is informed and believes, that the controversy was a separable one in that the defendant, the Southern Pacific Company, is required to account for certain profits realized under a reorganization agreement made in connection with the affairs of the Houston and Texas Central Railway Company, of which the majority of the stock was controlled by the Southern Pacific Company, and by which it secured benefits and advantages, and made profits for itself at the sacrifice of the minority stockholders of the said Railway Company, of which minority stockholders the plaintiff is one; and

of which will more fully appear from the papers in this cause on file in the office of the Clerk of this Court, to which papers reference is hereby made as if the same were set out at length.

A motion was made on deponent's behalf to remand the
108 cause, deponent claiming that it was not a separate controversy within the meaning of the statute.

On the 30th day of November, 1908, the Court denied deponent's motion to remand.

Thereupon, and on the 2nd day of December, 1908, the defendant, Southern Pacific Company, Frederic P. Olcott and The Houston and Texas Central Railroad Company, filed and served a plea to the bill of complaint to the effect that the Houston and Texas Central Railway Company, is a citizen and resident of the State of Texas, and that this Court has no jurisdiction of the said company, and that it is a necessary and indispensable party to the suit, and that the Railway Company has not been and cannot be brought by process within the jurisdiction of this Court, and has not subjected itself to the jurisdiction of this Court by voluntary appearance or otherwise, and that in the absence of, and without the presence of the said Houston and Texas Central Railway Company no full, complete or final determination of this suit or controversy can be had, nor complete or final justice be done or decreed, a copy of which plea is hereto annexed and marked "A."

That at the same time, a plea substantially to the same effect, and in the same form was filed on behalf of the Metropolitan Trust Company of the City of New York and the Central Trust Company.

That subsequently, and on the 14th day of December, 1908, a substantially similar plea was filed on behalf of the Farmers Loan and Trust Company, so that all of the defendants (excepting the defendant, The Houston and Texas Central Railway Company) have filed a plea in the form, and as above stated.

109 Deponent further states, as he is advised and verily believes, that there is no statute of the United States that permits of the service of process on the said Houston and Texas Central Railway Company by publication, and none of the officers or directors of the said Railway Company is within the jurisdiction of this Court, so that personal service could be made, and the said defendant Railway Company does not intend to appear voluntarily, nor subject itself to the jurisdiction of this Court by voluntary appearance or otherwise.

That under the practice applicable to the New York upreme Court, as deponent is advised and verily believes, an action may be brought against a foreign corporation, and jurisdiction obtained by service of the process outside of the State, or by publication, on an order obtained, if the defendant cannot be served within the State after due and reasonable diligence.

That in this action jurisdiction can be obtained over the said Railway Company in the New York Supreme Court by the service of the summons upon the said Railway Company outside of the State or by publicatiton, by order of the Court.

That the said Southern Pacific Company, which is charged with

having received property for which it should account to the plaintiff and other minority stockholders, has an office in the City of New York, and in the County and State of New York. That its President, Mr. E. H. Harriman resides in the City of New York, in the County and State of New York, and the Southern Pacific Company was served with process in the City of New York, as well as all the other defendants, as hereinbefore stated, were duly served
110 with process in the County of New York (other than the Railway Company) and duly appeared herein by counsel.

That as deponent verily believes and charges, this cause was removed by the non-resident defendants above referred to, in order to oust the State Court of jurisdiction, and they have now filed a plea in this Court, where, according to their plea, the case cannot be tried on its merits because of the inability to secure jurisdiction over the Houston and Texas Central Railway Company.

That in the State Court, where the action was originally brought, jurisdiction can be obtained over the said Railway Company, and it can be duly brought into Court and subjected to its process, mandate and decree.

That this question was not presented to the Court on the former motion to remand, at which time no plea had been interposed on behalf of any of the defendants, and it was, therefore, not apparent that the purpose of the removal of the cause was to deprive the State Court of its jurisdiction and leave the suit pending in this Court, which cannot get jurisdiction of all the defendants and thus deprive the plaintiff of trial upon the merits.

WALTER B. LAWRENCE.

Sworn to before me this 27th day of January, 1909.

ROB'T S. SCHMIDT,
Notary Public, Westchester County.

Certificate filed in New York Co.

111 At a stated term of the United States Circuit Court for the Eastern District of New York, held at the Post Office Building, in said district, in the Borough of Brooklyn, County of Kings, on the 27th day of March, 1909.

Present: Hon. Thomas I. Chatfield, District Judge holding the Court.

WALTER B. LAWRENCE, Suing on Behalf of Himself and Other Stockholders of the Houston & Texas Central Railway Company Similarly Situated Who May Come in and Contribute to the Expenses of this Action, Plaintiff,

against

SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL Trust Company of New York, Metropolitan Trust Company of the City of New York, The Houston & Texas Central Railroad Company and Houston & Texas Central Railway Company, Defendants.

The plaintiff having moved for leave to renew the motion to remand the above entitled action to the Supreme Court of the State

of New York, Queens County from whence it came, and for an order remanding the said action accordingly, upon the record in the above entitled action filed in the office of the Clerk of the United States Circuit Court for the Eastern District of New York, the affidavit of Walter B. Lawrence sworn to January 27, 1909, and the pleas interposed by the defendants herein;

Now on reading and filing the said affidavit of Walter B. Lawrence, sworn to January 27, 1909, and upon all the papers
112 and proceedings herein, and after hearing David Gerber and H. Snowden Marshall of counsel for the plaintiff in support of said motion, and Arthur H. Van Brunt of counsel for the defendants, Southern Pacific Company, Frederic P. Olcott and The Houston & Texas Central Railroad Company in opposition thereto, and due deliberation having been had, and on motion of Joline, Larkin & Rathbone, Solicitors for the defendants Southern Pacific Company, Frederic P. Olcott and The Houston & Texas Central Railroad Company, it is

Ordered that the said motion be, and the same hereby is, in all respects denied.

(Signed) THOMAS I. CHATFIELD,
U. S. J.

Endorsed: Order. Filed and entered March 27, 1909.

113 At a Stated Term of the United States Circuit Court for the Eastern District of New York, held at the Court-rooms in the County of Kings, on the 23rd day of October, 1909.

Present: Thomas I. Chatfield, Judge.

WALTER B. LAWRENCE, Suing on Behalf of Himself and Other Stockholders of the Houston and Texas Central Railway Company Similarly Situated Who May Come in and Contribute to the Expenses of this Action, Complainant,

against

SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL TRUST Company of New York, Farmers' Loan and Trust Company, Metropolitan Trust Company of the City of New York, The Houston and Texas Central Railroad Company and Houston and Texas Central Railway Company, Defendants.

On reading the annexed affidavit of Arthur H. Van Brunt, sworn to to-day, and on all the papers and proceedings herein,

Now, on motion of Joline, Larkin & Rathbone, solicitors for the defendants Southern Pacific Company, The Houston & Texas Central Railroad Company and Central Trust Company of New York,

Let Walter B. Lawrence, the plaintiff herein, show cause before me, at a stated term of this court to be held in the United States Postoffice Building in the City of Brooklyn, County of Kings, The City of New York and Eastern District of New York, on
114 the 29th day of October, 1909, at 3:30 P. M., at the opening of court on that day or as soon thereafter as counsel

can be heard, why an order should not be made dismissing this action, or for such other relief as may be proper; and in the meantime all proceedings on behalf of the plaintiff herein are stayed until twenty days after the hearing and determination of the motion under this order to show cause; and the time of the said defendants Southern Pacific Company, The Houston and Texas Central Railroad Company and Central Trust Company of New York, to take testimony in support of the pleas heretofore filed by them respectively, in this action, be and the same hereby is, extended until twenty days after the hearing and determination of said motion.

Sufficient reason appearing therefor, let service of a copy of this order upon the plaintiff or his attorneys, on or before October 23rd, 1909, be sufficient.

THOMAS I. CHATFIELD,
United States Judge, Holding Circuit Court.

Endorsed: Order to show cause. Filed October 23, 1909.

115 United States Circuit Court, Eastern District of New York.

WALTER B. LAWRENCE, Suing on Behalf of Himself and Other Stockholders of the Houston and Texas Central Railway Company Similarly Situated Who May Come in and Contribute to the Expenses of this Complainant,

against

SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL TRUST Company of New York, Farmers' Loan and Trust Company, Metropolitan Trust Company of the City of New York, The Houston and Texas Central Railroad Company and Houston and Texas Central Railway Company, Defendants.

STATE OF NEW YORK,
County of New York, Southern District of New York, ss:

Arthur H. Van Brunt, being duly sworn, deposes and says: That he is a member of the firm of Joline, Larkin & Rathbone, solicitors for the defendants Southern Pacific Company, The Houston and Texas Central Railroad Company and Central Trust Company of New York; that he has charge of the said action in the office of the said attorneys, and is familiar with all the proceedings heretofore had herein;

That this action was begun in the Supreme Court of New
116 York for Queens County, by the service of the summons and complaint herein upon the defendants Southern Pacific Company and The Houston and Texas Central Railroad Company, February 19, 1908.

The defendants Frederic P. Olcott and Central Trust Company of New York appeared herein voluntarily by Joline, Larkin & Rathbone, their attorneys, February 20, 1909;

Deponent is informed and believes, and therefore alleges, that the summons and complaint were also served on or about said 19th day

of February, 1908, upon the defendants Farmers' Loan & Trust Company and Metropolitan Trust Company of The City of New York; but that the summons and complaint herein have never been served upon the defendant Houston and Texas Central Railway Company; and that said last mentioned company has never appeared voluntarily in this action.

On March 9, 1908, the defendants represented by deponent's firm filed in the office of the Clerk of the County of Queens, a petition and undertaking for the removal of this case to the United States Circuit Court for the Eastern District of New York, and said case was thereafter duly removed unto the said court.

Thereafter the plaintiff made a motion to remand the case to the Supreme Court of Queens County, which motion was denied by this court and an order entered accordingly December 1, 1908.

On December 1, 1908, a plea in bar to the complaint herein was filed by the defendants Southern Pacific Company, Frederic P. Olcott and The Houston and Texas Central Railroad Company,
117 setting up that the defendant Houston and Texas Central Railway Company was an indispensable party to the action; that it was a corporation organized under the laws of the State of Texas and could not be served with process in this action; and that the action could not proceed in the absence of the said defendant.

A similar plea was filed by the defendant Central Trust Company of New York December 15, 1908.

On or about January 28, 1909, the plaintiff made another motion to remand the case to the Supreme Court of New York for Queens County, which motion was denied by this court and an order entered accordingly March 27, 1909.

On March 25, 1909, a replication to the pleas filed by the defendants Southern Pacific Company, Frederic P. Olcott, The Houston and Texas Central Railroad Company and Central Trust Company of New York, was filed by the plaintiff.

The defendant Frederic P. Olcott died on or about April 15, 1909.

The said defendant Olcott was at the time of his death, and had been at all times during the pendency of this action, a citizen of the State of New Jersey and a resident of Bernards Township in said state.

Thereafter, and on or about May 4, 1909, the last will and testament of the said defendant Olcott was duly admitted to probate by the Surrogates' Court of Somerset County, New Jersey, and letters testamentary were duly issued out of the said court to James N. Wallace and Dudley Olcott as executors. The said James N. Wallace and Dudley Olcott duly qualified as executors of the last will
118 and testament of the said defendant Olcott in the State of New Jersey. No ancillary or other letters testamentary or of administration, have been issued upon the estate of the said defendant Olcott within the State of New York to the said James N. Wallace and Dudley Olcott or to any other person or persons.

On or about August 11, 1909, a motion was made by the plaintiff herein, for an order reviving the action against the defendant

Frederic P. Olcott, and said motion was thereafter, and on or about September 16, 1909, withdrawn by the plaintiff before the same was heard, and the action has never been revived against the executors of the said defendant Olcott, nor have the said executors appeared herein.

The time of the defendants represented by deponent's firm has been from time to time extended by order of this court, entered upon the stipulation of the parties consenting to such extension. The last order extending the time of the said defendants to take testimony upon the pleas filed by them, was entered on or about September 30, 1909, and extended the time of the said defendants to take said testimony, one month from September 25, 1909, or to October 25, 1909.

On or about October 22, 1909, deponent requested the solicitors for the plaintiff to consent to a further extension of the time of the defendants represented by his firm, to take testimony in support of the pleas filed by them as aforesaid, and to sign a stipulation so extending the time of the said defendants, but the said extension of time was refused by the plaintiff's solicitors.

Deponent has fully examined the facts in relation to the
119 defenses existing to the complaint herein, in favor of the defendants represented by his firm, and the officers of the said defendant companies have fully and fairly stated to deponent the defenses so existing in their favor, to the said cause of action. From the said investigations and statements, deponent verily believes that the said defendants have a good and substantial defense upon the merits, to the cause of action set forth in the complaint herein.

The extension of time herein asked for is not made for the purpose of delay.

Deponent alleges that, as appears from the complaint in this action, the defendant Frederic P. Olcott is a necessary and indispensable party to the relief sought herein; that this action has abated as to the said defendant Olcott, by reason of his death and cannot be revived as to him; and that the executors of the said defendant have not been, and cannot be, brought by process within the jurisdiction of this court; that in the absence and without the presence of the executors of the said defendant Olcott, no full, complete or final determination of this suit can be had, nor complete or final justice be done.

Deponent therefore asks for an order dismissing this action as to all the defendants herein.

By reason of the fact that the time of the defendants represented by deponent's firm, to take testimony in support of the pleas heretofore filed by them, expires next Monday, October 25, 1909, deponent also asks that all proceedings on behalf of the plaintiff be stayed herein until twenty days after the hearing and determina-
120 tion of the motion to dismiss the complaint; and that the time of the said defendants to take testimony in support of their pleas, be likewise extended for a like time. If the motion to

dismiss the complaint is granted, the taking of testimony in support of the pleas will become unnecessary.

The reason why an order to show cause is asked for, is because the time of the defendants to take testimony in support of their pleas expires October 25, 1909, so that there is no time to serve the ordinary notice of motion.

No other or previous application for any of the relief herein asked for has been made, except as stated above.

(S'd) ARTHUR H. VAN BRUNT.

Subscribed and sworn to before me this 23 day of October, 1909.

[SEAL.] M. E. HELLSTERN,
Notary Public, Kings Co.

Certificate filed in N. Y. Co.

Endorsed: Affidavit. Filed October 23, 1909.

121 United States Circuit Court, Eastern District of New York.

M'ch 4, 1910.

WALTER B. LAWRENCE, Suing on Behalf of Himself and Other Stockholders Similarly Situated Who May Come in and Contribute to the Expenses of this Action, Plaintiff,

against

SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL TRUST Company of New York, Farmers' Loan and Trust Company, Metropolitan Trust Company of the City of New York, The Houston and Texas Central Railroad Company, and Houston and Texas Central Railway Company.

Dittenhoefer, Gerber & James, solicitors for complainant; A. J. Dittenhoefer, H. Snowden Marshall and David Gerber, of counsel.

Joline, Larkin & Rathbone, solicitors for defendants Central Trust Company of New York, Southern Pacific Company, and Houston and Texas Central Railroad Company; Arthur H. Van Brunt and Henry V. Poor, of counsel.

CHATFIELD, *J.*:

The complainant, stating that he sues on behalf of himself and other stockholders of the Houston and Texas Central Railway Company who may be similarly situated and who may come
122 in, has brought an action in equity in the Supreme Court of Queens County, since removed into the Circuit Court for this district, against the Southern Pacific Company, The Central, The Metropolitan, and Farmers' Loan and Trust Companies, the Houston and Texas Central Railroad Company, and the Houston and Texas Central Railway Company, and also one Frederic P. Olcott, who happened at the time of certain transactions to be President of the Central Trust Company, and to have bid in the property

of the Houston and Texas Central Railway Company at a sale held under the decree of the United States Circuit Court for the Eastern District of Texas, in which suit the claims of the Southern Pacific C[illegible] and certain mortgagees, consolidated in the one action, w[illegible] determined and a reorganization effected between the So[illegible]cific Company, certain Trust Companies, and many of the [illegible]lders. Upon May 4, 1888, a decree in the consolidated actio[illegible] was entered ordering a sale of the entire property upon the defaults on the various mortgages recited in the decree. All possible defenses were withdrawn, the decree was enterd substantiallly by consent, and at the sale held in pursuance of this decree the property was bid in, according to the terms of the reorganiza-
123 tion agreement, by Mr. Olcott. The new or reorganized corporation was called the Houston and Texas Central Railroad Company, and the property bought in by Mr. Olcott was transferred to that company, except certain lands which had been pledged as security for the bonds of the old company, and these lands were conveyed by Mr. Olcott as security to three Trust Companies, one of which was the Central, who advanced money or made loans under the terms of the reorganization agreement. The bondholders of the old company accepted the bonds of the new company, but according to the complaint in this action, the minority stockholders of the old company refused to pay the assessments which were demanded, and ultimately all of the stock of the new company was taken over by the Southern Pacific Company, which now holds the same, certain guaranties having been made by the Southern Pacific Company at the time of so doing.

The Complainant alleges unequal treatment, so far as the minority stockholders are concerned, on the part of the Southern Pacific Company, and the existence of a trust upon the stock of the reorganized railroad in the hands of the Southern Pacific Company.

The complaint also alleges that the defendant Trust Com-
124 panies have no beneficial interest in the lands purchased by Mr. Olcott and conveyed for trust purposes to each of these Trust Companies, and that the complainant has requested the directors of the old company to commence an action for an accounting against the Southern Pacific Company, Mr. Olcott, or any of those named as defendants in this action, and that these directors have refused so to do.

It is further alleged that these directors have taken the position that neither the Southern Pacific Company nor Mr. Olcott should be called upon to account or afford any relief to the minority stockholders who are said to be some one hundred in number; and the relief prayed for is that the Southern Pacific Company be held to have acquired and to hold the capital stock of the reorganized Texas Company and t he profits and earnings received therefrom as trustee for the minority stockholders, as their rights may appear; that an accounting be had from the Southern Pacific Company; that it be adjudged that neither of the three defendant Trust Companies nor Mr. Olcott had a beneficial interest in the lands; that after the carrying out of the trust agreements by the Trust Companies

the surplus of the lands, which would then revert to Mr.
125 Olcott, be transferred, assigned and delivered to the old Railway Company; and an injunction and the appointment of a receiver to carry the decree into effect (in which injunction the prayer asks that Mr. Olcott be also included) is demanded.

The action thus instituted was removed into the United States Court by the Southern Pacific Company, Frederic P. Olcott, and the Houston and Texas Central Railroad Company, appearing specially. The petition on removal states that the defendants Olcott and the Central Trust Company had already appeared in the action, but that the time to answer had not expired. A motion to remand was denied upon the ground that the Trust Companies were not indispensable parties to the action.

It then appeared that the defendant the Houston and Texas Central Railway Company had not been served and had no intention of appearing voluntarily; and that Mr. Olcott had subsequently died in the State of New Jersey, letters testamentary having been taken out by his executors in that state. A suggestion to that effect has been entered upon the minutes of this court, by a motion to dismiss the complaint upon the ground that the action cannot proceed without Mr. Olcott or his representatives, and that
126 the complainant can neither bring these representatives in as parties defendant nor have they voluntarily joined in the action, nor taken out ancillary letters within the State of New York.

This particular motion is made by the defendants the Southern Pacific Company, the Houston and Texas Central Railroad Company, and the Central Trust Company. It appears that subsequent to the motion to remand a plea in bar, to the effect that the Houston and Texas Central Railway Company was an indispensable party to this action, had been interposed by the defendants who did appear, namely, the Southern Pacific Company, Mr. Olcott, the Houston and Texas Central Railroad Company, and also the Central Trust Company. A replication on the part of the complainant was filed before Mr. Olcott's death.

If Mr. Olcott or his representatives are necessary and indispensable parties to the trial of any cause of action set forth in the complaint, then the action must be held to have abated. If there be a cause of action which would not abate, and as to which the suit can be revived by bringing in the proper parties to give the court necessary jurisdiction, or if there be an alleged cause of action which can be litigated without Olcott's representatives, then a dis-
127 missal should not be granted.

It appears from the complaint that Mr. Olcott was a proper party to be joined as defendant, and if all of the issues relating to these transactions are to be settled between the parties in one action, Mr. Olcott or his representatives would be an indispensable party to the determination of the precise issue that is raised with reference to his rights.

But it does not follow that the death of Mr. Olcott raised the question of abatement of the entire action, nor does the possibility

of revivor, whether made as against his representatives or by them, determine whether he was an indispensable party to the suit. A suggestion upon the record would allow the executors to make a motion for revivor under Section 955 of the Revised Statutes; and in the same way, upon such a suggestion entered on the record, the case might proceed, under the terms of Section 956 of the Revised Statutes, as to any parties or issues in which Mr. Olcott or his representatives were not required for the adjudication of their claims. Where the proposition that an action has abated is raised by other defendants, but where the possibility of revivor exists up to
128 the time for trial, it would seem that the question of the lack of necessary or indispensable parties may be raised by motion, but should not be determined summarily, when, as in the present instance, the absence of the alleged necessary parties is based upon the fact that the executors of Mr. Olcott's estate have not as yet applied for letters within the State of New York, and hence can neither be sued nor are in a position to bring suit. Jessup v. Ill. Cent. R. Co., 36 Fed. 735;Picquet v. Swan, 5 Mason, 561.

It is evident that a suit could not be instituted against executors in another state than where they have taken out letters, upon a cause of action in the federal court in which jurisdiction is based upon citizenship. Lewis v. Parrish, 115 Fed. 285; Skiff v. White, 127 Fed. 175. Nor can a suit be revived against executors in some state other than that in which they have been authorized to act in their representative capacity, unless ancillary letters shall be obtained in the state where the action is pending. Filer & Stowell Co. v. Rainey, 120 Fed. 718.

A determination that jurisdiction does not exist if the cause of action be not separable, can be disposed of upon motion, if
129 the question of jurisdiction is plainly ascertainable from the pleadings and depends solely upon the statement of the cause of action. But if there is any doubt as to the question, or if there is a possibility of revival, then the action should be dismissed on motion only for lack of prosecution and unreasonable delay.

In the present case, the result of a dismissal would be to put the plaintiff out of court, with no determination of the rights of the minority stockholders as against the Southern Pacific Company and the Texas Railroad Companies, under the reorganization plan, and without any determination upon the plea at bar which has been already interposed.

A further plea, based upon the ground of the necessity or indispensablity of representation on the part of Mr. Olcott's executors, could be considered in connection with the plea already interposed, and if the complainant can maintain a cause of action or prove that it has a cause of action against the Southern Pacific Company and the Houston and Texas Central Railroad Company, which can be litigated in the absence of the Houston and Texas Central Railway Company and of Mr. Olcott's representatives (who seem to be entitled to a reversion of the lands in question) this court should not dismiss the action solely upon the ground that another
130 suit may be necessary. The complainant is the one to determine whether a new action can be brought in one jurisdiction

against all of the parties concerned in the different issues presented by the present complaint. The complainant also must consider the necessity which he will be under of bringing an action against Mr. Olcott's representatives if the present suit should be determined in favor of the minority stockholders against the Railroads; and it would seem that the question of whether Mr. Olcott's representatives or heirs should ultimatey be called upon to reconvey a reversionary interest is separable from the cause of action against the Railroad Companies. That cause of action is not dependent upon the existence of any reversionary interest or balance after the application of the collateral to the payment of the bonds secured by that collateral; nor, (if the persons holding title should then refuse to comply with any demand) upon ability of the complainant or any other minority stockholder to impress a trust upon the reversion. Mr. Olcott was no more necessary to the determination of the claim against the Railroad Companies, except as he might wish to appear and defend his own action, than are the Trust Companies who must administer their trusts so as to be able to account
131 to all of those who are entitled to such an accounting.

For both of these reasons, therefore, the present motion must be denied.

THOMAS I. CHATFIELD, *U. S. D. J.*

132 At a Stated Term of the United States Circuit Court, for the Eastern District of New York, held in the United States Court House, in the Borough of Brooklyn, City of New York, on the 19th day of March, 1910.

Present: Hon. Thomas I. Chatfield, District Judge.

WALTER B. LAWRENCE, Suing on Behalf of Himself and Other Stockholders Similarly Situated Who May Come in and Contribute to the Expenses of this Action, Complainant,

against

SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL Trust Company of New York, Farmers' Loan and Trust Company, Metropolitan Trust Company of the City of New York, The Houston and Texas Central Railroad Company, and Houston and Texas Central Railway Company, Defendants.

The defendants Southern Pacific Company; The Houston and Texas Central Railroad Company, and Central Trust Company of New York, having obtained an order directing the complainant to show cause why an order should not be made, dismissing the bill of complaint in the above entitled action, and for such other and further relief as might be proper, and the said motion having duly come on to be heard,

Now, on reading and filing the order to show cause, and the affidavit of Arthur H. Van Brunt, sworn to the 23rd day of October, 1909, and after hearing Arthur H. Van Brunt, of counsel for the Southern Pacific Company, in support of said motion, and David Gerber, of counsel for complainant, in opposition thereto, and due deliberation having been held.

Now, on motion of Dittenhoefer, Gerber & James, solicitors for the complainant, it is

Ordered: That the said motion be and it hereby is in all respects denied.

(Signed) THOMAS I. CHATFIELD, *U. S. D. J.*

Endorsed: Order. Filed and entered March 19, 1910.

133 United States Circuit Court, Eastern District of New York.

WALTER B. LAWRENCE, Suing on Behalf of Himself and Other Stockholders of The Houston & Texas Central Railway Company, &c., Plaintiff,

against.

SOUTHERN PACIFIC COMPANY et al., Defendants.

Agreed Statement of Facts.

The Houston & Texas Central Railway Company was incorporated under the name of the "Galveston & Red River Railway Company" by a special act of the second legislature of Texas approved March 11, 1848. (Special Laws 1848, Chapter 204).

This act contained no limitation upon the period of the corporate existence of the Company.

By another special act, approved September 1, 1856, the name of the Company was changed to "The Houston & Texas
134 Central Railway Company" (Special Laws 1856, Chapter 351).

Prior to the year 1885, The Houston & Texas Central Railway Company owned and operated three lines of railway in the State of Texas, viz.: a "Main Line" from Houston to Denison, Texas, a "Western Division" from Hempstead to Austin, Texas, and a "Waco and North Western Division" from Bremond to Rose, Texas. It was also the owner of lands which had been granted to it by the State of Texas amounting to some 4,500,000 acres. It had a capital stock of $7,726,900.

The property of the Railway Company was subject to mortgages securing bonds outstanding as follows:

1. Main Line First Mortgage dated July 1, 1866, covering Main Line and ten sections of land for each mile of road built or to be built, securing seven per cent. bonds due July 1, 1891, of which $5,838,000 were outstanding.

2. Western Division First Mortgage dated December 21, 1870, covering Western Division and ten sections of land for each mile of road built or to be built, securing seven per cent bonds due July 1, 1891, of which $2,226,000 were outstanding.

3. Waco and North Western Division First Mortgage
135 dated June 16, 1873, covering Waco and North Western Division, and 6000 acres of land per mile of completed road, securing seven per cent bonds amounting to $1,144,000.

4. Main Line and Western Division Consolidated Mortgage dated

October 1, 1872, covering Main Line and Western Division and 3840 acres of land per mile of completed road, securing eight per cent bonds due May 1, 1915, of whic $567,000 were outstanding. ing in the hands of the public and $666,000 were held by the Trustee of the General Mortgage hereinafter referred to.

5. Waco and North Western Division Consolidated Mortgage dated May 1, 1875, covering Waco and North Western Division and 6000 acres of land per mile of completed road, securing eight per cent bonds due May 1, 1915, of which $567,000 were outstanding.

6. Income and Indemnity Mortgage dated May 7, 1877, covering all the lines of railway and all lands, land grants, town lots and other property of the Company, securing $1,500,000 seven per cent bonds due May 1, 1887, of which $1,499,000 were held by the Trustee of the General Mortgage of the Company and one bond of $1000 was outstanding in other hands.

136 7. General Mortgage dated April 1, 1881, covering all the lines of the Railway Company, all its franchises and profits and also sixteen sections or square miles of land for each mile of completed road and certain town lots and other real estate, securing six per cent bonds due April 1, 1921, of which $4,305,000 were outstanding.

On May 4th, 1888, the amount of the principal of the bonded debt of the Company was $20,165,000, of which $666,000 of Main Line and Western Division Consolidated Bonds, and $1,499,000 Income and Indemnity Bonds were held by the Trustee of the General Mortgage, having been received in exchange for General Mortgage Bonds and retained uncanceled to protect the security of the General Mortgage Bonds, leaving the net amount of principal outstanding $18,000,000.

In addition, the Railway Company was indebted to the State of Texas in a sum which the State claimed to be $460,000 and which the Railway Company admitted to be $190,000, secured by mortgage on seventy-five miles of the railway. The Company also owed a floating debt amounting to about $3,000,000.

During the years 1885 and 1886, default having been made upon the bonds of the Railway Company issued and outstanding
137 under the mortgages above referred to, suits were instituted in the United States Circuit Court for the Eastern District of Texas for the foreclosure of the several mortgages, and receivers of the property of the company appointed, who took possession and continued to operate the lines of railroad of the Company until after the foreclosure sales hereinafter mentioned and the delivery of the property to "The Houston and Texas Central Railroad Company," a new corporation formed as hereinafter set forth.

The several suits brought for the foreclosure of the mortgages of the Railway Company were consolidated, and on May 4, 1888, a decree of foreclosure and sale was entered in the consolidated cause, in pursuance of which all the property of the Railway Company was sold at Galveston, Texas, September 8, 1888.

The properties were offered for sale in the manner required by the decree and sold in two parcels, viz.:

1. Parcel consisting of the property covered by the Waco and North Western Division First Mortgage (subject, however, to that mortgage) to George E. Downes for $25,000.

2. All the residue of the property of the Railway Company to Frederic P. Olcott for $10,580,000.

138 By order made December 4, 1888, the sale was confirmed.

The properties purchased by Mr. Olcott were duly conveyed to him by deed dated January 18, 1889, in which the Special Master appointed to make the sales, the Trustees of the several foreclosed mortgages and the old defendant Railway Company united as grantors.

The property purchased by Mr. Downes was conveyed to him by deed of the same date, executed by the same grantors.

In pursuance of the agreement of reorganization, a copy of which is annexed to the complaint in this action as Exhibit "A," a new corporation, the defendant The Houston & Texas Central Railroad Company was formed under Chapter 24 of the Laws of Texas of 1889 (Sayles' Texas Civil Stat., Art 4550). The charter of the new company was filed in the office of the Secretary of State of the State of Texas on the 1st day of August, 1889. To this corporation Mr. Olcott transferred the lines of railway purchased by him at the foreclosure sale (not including, however, the land grant purchased by him.)

139 Under date of April 1, 1890, the new Railroad Company executed three mortgages securing issues of bonds as follows:

1. Mortgage dated April 1, 1890 to Central Trust Company of New York to secure an issue of $8,634,000 five per cent first mortgage gold bonds due July 1, 1937.

2. Mortgage dated April 1, 1890, to The Farmers' Loan & Trust Company to secure an issue of $5,068,000 six per cent consolidated mortgage gold bonds due October 1, 1912.

3. Mortgage dated April 1, 1890, to Metropolitan Trust Company of the City of New York to secure an issue of $4,305,000 four per cent general mortgage gold bonds due April 1, 1921.

Simultaneously with the execution of these three mortgages Mr. Olcott conveyed the lands purchased by him at the foreclosure sale and not conveyed to the new Railroad Company by three trust indentures dated April 1, 1890, one to the Central Trust Company of New York, one to The Farmers' Loan & Trust Company and one to the Metropolitan Trust Company of the City of New York. By the terms of these three trust indentures the lands were to be sold for the benefit of the holders of the bonds issued under the three mortgages of the new Railroad Company, and it was further provided that upon the payment of the said bonds the estate

140 granted by the trust indentures should cease and determine.

Actions affecting the title to the lands covered by the three trust indentures were brought by the State of Texas against Mr. Olcott and The Houston & Texas Central Railway Company both before and after April 1, 1890.

The following are the names of the directors of the old The Houston & Texas Central Railway Company elected at the stockholders' meeting of the company held May 6, 1885:

A. C. Hutchinson.
C. P. Huntington.
Chas. Fowler.
E. W. Cave.
A. H. Swanson.
J. Waldo.
I. E. Gates.
J. G. Schriever.
J. J. Atkinson.

On June 7, 1886, the resignation of J. Waldo was accepted and Charles Dillingham elected in his place.

No successors of the above named directors were ever elected.

Of the directors named all are dead except three, whose names and places of residence are as follows, viz:

141 Names.	Residences.
A. H. Swanson	Port Christian, Mississippi.
I. E. Gates	New York City, N. Y.
Charles Dillingham	Houston, Texas.

Pursuant to the decree of foreclosure and sale, all of the properties and franchises of every kind of the Railway Company were sold for a sum over seven million dollars less than the amount decreed to be due, which deficiency has remained unpaid and is uncollectible.

Since the sale of the properties of the Railway Company under foreclosure the company has owned no property, either in the states of New York or Texas, or elsewhere, and has transacted no business. The Railway Company has not since that time had any place of business in the State of New York and none of the persons above named ever come to or remain within the State of New York upon the business of the company.

No meetings of the stockholders of the Railway Company have been held since the date of the foreclosure, September 8th, 1888, and no meetings of the directors of the company have been held since June 7, 1890.

For the purposes of the trial on defendants' pleas in bar to
142 the plaintiff's complaint herein,

It is hereby stipulated between the solicitors for plaintiff and the solicitors for the defendants Southern Pacific Company, Central Trust Company of New York, The Houston & Texas Central Railroad Company, The Farmers' Loan and Trust Company and the Metropolitan Trust Company of the City of New York that the foregoing shall constitute the agreed statement of facts on which, together with the pleadings and exhibits in this case and such portions of the statutes of the State of Texas as the parties may deem material, the issues of law and of fact presented by the pleas filed by the said defendants in bar to the plaintiff's complaint herein may be determined.

It is hereby further stipulated that the parties may refer to such portions of the statutes of the State of Texas, contained in the

printed volumes of the statutes of that state, as they may deem material, and that no proof of any such statute so referred to need be made by any of the parties hereto.

Notwithstanding this stipulation respecting the facts, the
143 court may consider the sufficiency of the pleas as matter of law.

Dated March 23d, 1910.

DITTENHOEFER, GERBER & JAMES,
Solicitors for Plaintiff.

JOLINE, LARKIN & RATHBONE,
Solicitors for Defendant Southern Pacific Company, Central Trust Company of New York, and The Houston & Texas Central Railroad Company.

TURNER, ROLSTON & HORAN,
Solicitors for Defendant The Farmers' Loan & Trust Company.

PARSONS, CLOSSON & McILVAINE,
Solicitors for Defendant Metropolitan Trust Company of the City of New York.

Endorsed: Agreed Statement of Facts. Filed March 23, 1910.

144 United States Circuit Court, Eastern District of New York.

WALTER B. LAWRENCE, Suing on Behalf of Himself and Other Stockholders Similarly Situated Who May Come in and Contribute to the Expenses of this Action,

against

SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL Trust Company of New York, Farmers' Loan and Trust Company, Metropolitan Trust Company of the City of New York, The Houston and Texas Central Railroad Company, and Houston and Texas Central Railway Company.

JULY 28, 1910.

Dittenhoefer, Gerber & James, solicitors for plaintiff; A. J. Dittenhoefer, H. Snowden Marshall and David Gerber, of counsel.

Joline, Larkin & Rathbone, solicitors for Central Trust Company of New York, Southern Pacific Company, and Houston and Texas Central Railroad Company; Arthur H. Van Brunt and Henry V. Poor, of counsel.

Turner, Rolston & Horan, solicitors for Farmers' Loan and Trust Company.

Parsons, Closson & McIlvaine, solicitors for Metropolitan Trust Company of the City of New York.

145 CHATFIELD, *J.:*

The facts involved in the present motion are matters of record and are sufficiently set forth in the opinions upon the motions previously decided in 165 Fed. 241 and 177 Fed. 547.

The earlier of these motions was an application to remand to the State Court from which the action had been removed, the plaintiff alleging that certain necessary defendants were citizens of the same state as himself. It appeared that these parties were not indispensable, and the motion was denied. The later application was for a dismissal of the action, upon affidavits alleging facts from which it was apparent that the present situation was likely to develop, and also setting up the death of one of the defendants whose personal representatives had not sought to have themselves brought in, and who could not be reached by the process of this court.

That motion was disposed of, upon the ground that the deceased defendant, or his personal representatives, were not indispensable to a trial of the issues between the other parties to the action, and also that the pleas which had been interposed should be brought
146 on for argument, rather than on motion to anticipate the actual joinder of issues.

At the present time the defendants the Southern Pacific Company and the Houston and Texas Central Railroad Company have joined in interposing a plea to the action, based upon the absence of the Houston and Texas Central Railway Company, as service cannot be had in such a manner upon that company as to be valid in the Circuit Court of the United States for this district.

The Central Trust Company of New York, one of the defendants which was held to be a proper but not indispensable party upon the first motion to remand, has likewise interposed a plea of the same nature, and a replication to these pleas having been filed by the plaintiff, a hearing has been had at which an agreed statement of facts had been presented. Upon these facts the defendants have moved to dismiss the entire action upon the ground of lack of jurisdiction, while the plaintiff has asked that if the court does not retain jurisdiction, the action be now remanded to the State Court, under the provisions of Section 5, Act of March 3, 1875, Chapter 137, as amended in 1887 and 1888.

It is apparent that the purpose of the various parties is to
147 settle the question of jurisdiction, and to determine the forum (if any) in which this suit can be brought, before a discussion of the merits of the case is attempted.

The sufficiency of the plea of no jurisdiction, as a matter of law, is thereby raised, and if the Circuit Court of the United States for this District has no jurisdiction, and if the action be dismissed, a determination of the case upon the merits is plainly unnecessary; while if the action should be remanded to the State Court, a determination upon the merits there should not be embarrassed by expressions of opinion of this court about what would be its decision if the case were before it.

The defendant contends, as a primary proposition, that the present action is in form what is known as a representative or stockholders' action. The plaintiff alleges in his complaint that he brings suit for himself and for all others who as minority stockholders have been affected by the various transactions in a similar way to himself,

and who may come in and share in the burdens and benefits of the action.

A number of cases have been cited upon this question, such as Davenport v. Dows, 85 U. S. 626, in which Judge Davis said:

148 "That a stockholder may bring a suit when a corporation refuses is settled in Dodge v. Woolsey, 18 How. 340, but such a suit can only be maintained on the ground that the rights of the corporation are involved. * * * A court of equity will not take cognizance of a bill brought to settle a question in which the corporation is the essential party in interest, unless it is made a party to the litigation."

Dewing v. Perdicaries, 96 U. S. 193, The Central Railroad Co. of New Jersey v. Mills and ano., 113 U. S. 249, and Swan Land & Cattle Co. v. Frank, 148 U. S., 603, all substantiate this proposition.

Various New York State decisions, cited and affirmed in Niles v. New York Central, etc. R. R. Co., 176 N. Y. 119, hold to the same effect.

A minority stockholder, therefore, if allowed to sue for a wrong done to the corporation, must recover, if he recovers at all, damages or specific performance, which would result in the payment of money or transfer of property to the corporation, and in which all stockholders have their rights as stockholders.

In the cases of De Neufville v. New York &c. Ry. Co., 81 Fed. 10, Redfield v. Baltimore & Ohio R. R. Co., 124 Fed. 929, Ames v. American Tel. & Tel. Co., 166 Fed. 820, it was held on demurrer

149 that when the injuries alleged, have been sustained, if at all, by the corporation, it should come in and defend its action, or its failure to follow up the alleged wrongs, and the corporation was decided in each case to be a necessary party.

The plaintiff herein attempts to meet the charge that this is a representative action, and that the Texas and Houston Central Railway Company (which has not been served) is a necessary party to the suit. He has cited Rogers v. Penobscot Mining Co., 154 Fed. 606, and Sioux City Terminal R. & W. Co. v. Trust Co. of N. A., 82 Fed. 124, in which the courts discuss at length the provisions of Section 737 of the Revised Statutes, and Equity Rule 47. But these cases do not settle for us the question whether the Houston and Texas Central Railway Company is an *indispensable* rather than a proper party in the present action.

In the case of Rogers v. Penobscot Mining Co. (supra) a number of citations are given and a clear definition of indispensable and proper parties furnished, on page 616 of the report. The conclusion is that the defendants in question were necessary parties under the old chancery rule, but not indispensable parties under the section

150 and rule above referred to, "because a final decree can be rendered herein between the complainants and the defendants, which will completely adjudicate their rights, without binding or injuriously affecting the rights of the defendants not served."

Recently in this Circuit, in the case of Kuchler v. Greene, 163 Fed. 91, and again in Slater Trust Co. v. Randolph-Macon Coal Co.,

166 Fed. 171, the Circuit Court of the Southern District of New York passed upon the question whether a certain defendant was an indispensable party.

In the Kuchler v. Greene case, the action was against individuals for an accounting of profits as between stockholders, while in the Randolph-Macon case, the real controversy was against certain directors, who were being sued for fraud by bondholders who asked for money damages, and while each case is near enough in its nature to the case at bar to afford some aspects of a representative action, nevertheless the actual relief there demanded would not seem to be the restoration of rights to the corporation itself, to be there devoted to corporation purposes for the benefit of the plaintiff, as is the case in the present action.

In Payne v. Hook, 7 Wall. 425, the Supreme Court of the United States said, that the rule requiring all persons materially in-
151 terested to be made parties to an action, should yield if the court is able to proceed to a decree and to do justice to the parties before it, especially when an enforcement of the rule would oust the court of jurisdiction "and deprive parties entitled to the interposition of a court of equity of any remedy whatever."

Many cases are cited in support of this proposition, and Mr. Justice Story, in West v. Randall, 2 Mason, 181, again refers to the necessity of such a yielding of rule in the United States Courts, where the limited nature of its authority might otherwise oust the court of jurisdiction.

In Ervin and others v. Oregon Railway & Nav. Co., 20 Fed. 577, a corporation was held not to be indispensable as it was not a going concern, when the plaintiffs, who were formerly stockholders, attempted to follow into the hands of third parties assets that had been transferred by the corporation before it ceased to exist. The doctrine asserted in this case is more nearly applicable to the present litigation than any of the other cases cited, and but for the peculiar facts of this case, might be taken as a precedent at the present time.

In the present action, however, the charge is that the missing de-
fendant company, which now appears to have one director
152 within the State of New York, and to be doing no business in that state, to have had no election of directors since 1885, and to have had no meetings of any sort since the decree of foreclosure under which the property was sold, should nevertheless be brought to life, and its directors should sue the other defendants to recover the property which it is charged was illegally transferred or allowed to be transferred for the benefit of certain majority stockholders. And prior to the death of the defendant Olcott, there was also present the question as to the ownership of certain land, admittedly available as security for an issue of bonds, but if more than sufficient to secure that issue, apparently originally an asset of this absent defendant corporation.

The plaintiff does not seek to recover a share of the profits of any of the transactions of the corporation or its majority stockholders, he does not seek to obtain damages, nor is there any theory shown upon which he can prove damage to his property, nor as to which

an accounting would result in a decree in which compensation could be computed upon the plaintiff's rights as distinguished from his ultimate position as a stockholder in the absent corporation.

153 It would seem to be necessary to hold, therefore that this action cannot proceed without the presence of the Houston and Texas Central Railway Company as a party thereto. Nor can it be urged that this railway company can be aligned as anything but a defendant and therefore entitled to representation upon any trial. It is the real party in interest if the sales of its property were invalid, and it is accused of the wrong doing by which its property was sold.

We therefore must consider what the situation is with this corporation a necessary and indispensable party, which has not been and cannot be served in such a manner in the present action as to give this court jurisdiction over it.

This defendant corporation must be brought into this court by proper service, and it appearing that a corporation doing no business within the state, and having no one who can be served either as officer or director, when engaged in the business of the corporation (Goldey v. Morning News, 156 U. S. 518; Conley v. Mathieson Alkali Works, 190 U. S. 406) cannot be made a party under the jurisdiction of the Circuit Court itself, we must consider what

154 is necessary procedure upon the present application. Venner v. Great Northern Railway Co., 209 U. S. 24.

In the last named case the Supreme Court holds, that a case is removable to the Circuit Court by the defendant, if it be one of which some Circuit Court of the United States has jurisdiction, for instance, a controversy between citizens of different states; (the Circuit Court having determined that it had jurisdiction, and that it had jurisdiction of the subject matter of the litigation, and having passed upon the compliance with the requirements of Equity Rule 94, relating to the verification of a stockholder's bill, founded upon rights which can be asserted by a corporation) that the very exercise of such a determination of jurisdiction was an exercise of jurisdiction over the subject matter of the action, and that the case should proceed in the Circuit Court for a further determination upon the merits.

In the case of In re Moore, 209 U. S. 490, the differences and difficulties found in the numerous decisions of removal cases are referred to, and the provisions of the various sections of the law, Chapter 137 of 1875, as amended by Chapter 866 of 1888, and Chapter 373 of 1887, are discussed. The court therein ex-

155 plained the case of Ex parte Wisner, 203 U. S. 449, and held, citing many other cases, that the general description of jurisdiction of United States Courts set forth in Section 1 of the Act of 1888, above quoted, allows the removal of any case into the proper Circuit Court of the United States from a State Court, when the Circuit Courts of the United States generally would have jurisdiction of the subject matter of such an action, or when a controversy between the parties to the suit might be brought in some Circuit Court of the United States; and when the defendants have

either waived the right to dispute the jurisdiction of the court of that particular jurisdiction, rather than that of some other district, or have consented to the choice of districts by bringing removal proceedings on their own behalf. The court says, on page 506:

"So long as diverse citizenship exists the Circuit Courts of the United States have a general jurisdiction. That jurisdiction may be invoked in an action originally brought in a Circuit Court or one subsequently removed from a state court, and if any objection arises to the particular court which does not run to the Circuit Court as a class that objection may be waived by the party entitled to make it. As we have seen in this case, the defendant applied for a removal of the case to the Federal court. Thereby he is foreclosed from objecting to its jurisdiction. In like manner, after the removal had been ordered, the plaintiff elected to remain in
156 that court, and he is, equally with the defendant, precluded from making objection to its jurisdiction."

The statement, "The defendant applied for a removal of the case to the federal court. Thereby he is foreclosed from objecting to its jurisdiction," would seem to be an express holding that the application for removal is a waiver of any objection to the exercise of the jurisdiction which some Circuit Court of the United States might have, as distinguished from the particular Circuit Court to which removal is asked. On page 496 the court says, also:

"That the defendant consented to accept the jurisdiction of the United States Court is obvious. It filed a petition for removal from the State to the United States Court. No clearer expression of its acceptance of the jurisdiction of the latter court could be had."

In the present case an exactly similar situation exists. The defendants have not objected to the jurisdiction of the United States Court. They have not attempted to appear specially, except for the purpose of removing the case, and they have filed pleas, thereby admitting the jurisdiction of this court over the parties and its right to determine whether it has jurisdiction over the cause of action. Venner v. Great Northern Railway Co. (supra) at page
35.
157 The statements in the Moore case are broad enough to cover the case of a defendant who has appeared specially solely for the purpose of removal, and then has objected to the jurisdiction of the Circuit Court of the United States upon the sole ground that the suit could not have been originally brought in that particular district.

It would seem to follow that in such a case the right to make an objection of that nature, that is to the jurisdiction of the court over the parties, had been waived. But the present case goes a step further. It is similar to a motion to dismiss, by a defendant who has appeared specially and removed the case, upon the ground that the service of the parties has not been of such nature as to allow the action to be maintained in the Circuit Court of the United States, under the provisions of Section 3 of the Act. This section provides that after removal, the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit

Court. But Section 5 of said Act further provides, that if at any time it shall appear that the suit does not properly belong within the jurisdiction of said Circuit Court, or there has been
158 improper or collusive joinder of parties, that the Circuit Court shall proceed no further therein, "but shall dismiss the suit or remand it to the court from which it was removed, as justice may require."

It may be noted here that in some cases the sentence just quoted has been interpreted to mean, that if the court does not appear to have jurisdiction, the suit shall be dismissed, if begun in the Circuit Court, but that it shall be remanded if removal has been had. (See Northern Pac. Ter. Co. v. Lowenberg, 18 Fed. 339.)

But the words in the alternative, followed by the phrase "as justice may require", which have been quoted above, do not indicate that this sentence was intended to be applied in the respectively consecutive way just indicated, but on the contrary, when either of the conditions arise, the proper alternative remedy should be applied to that condition.

With respect to the question of when an action should be dismissed, if a defendant appeared specially and removed the case, and then claimed that the court had not jurisdiction of the action and could not proceed to final judgment, it is only necessary to refer to such decisions as Goldey v. Morning News (supra)
159 where an action was dismissed because the service of the parties was not such as would justify the maintenance of an action in the United States Court, Conley v. Mathieson Alkali Works (supra), Geer v. The Same, 190 U. S. 428, and many others in the Circuit Courts themselves.

So in the present case, the alleged defect does not lie in the method of service, it does not lie in a question as to whether the parties now here are properly before the court, nor whether they can object to the court's disposing of the case. Its right so to do is admitted. But the precise objection is that the case cannot proceed to judgment through the lack of an indispensable party, and that the objection on that ground must be considered, exactly as if the action had been instituted in the Circuit Court of the United States originally, and upon the trial plaintiff had been confronted with an objection to proceeding in the absence of this indispensable defendant.

There would be no answer to such a situation, and in a case at law, a dismissal or the withdrawal of a juror, accompanied by the granting of leave to amend or to bring in the party (or in a case tried without a jury, similar action in the appropriate way) would be necessary.

160 The defendants insist that upon the testimony offered, the action being now before the court on a hearing upon the pleas raising these precise questions, and it admittedly being impossible to serve or to obtain the appearance of the missing defendant, no alternative exists other than that the action should be dismissed.

Such a decision would leave the plaintiff apparently remediless,

for he could not serve the various defendants in any Circuit Court of the United States, and he could not start an action in the State Court, as every action of this nature would be subject to removal and a similar dismissal. The effect of this interpretation would be to make the act of Congress, not jurisdictional for the sake of removing and hearing the cause, but jurisdictional to the extent of taking the plaintiff from a forum where his case could be heard, and compelling him to litigate in a forum where his case could not be heard, and from which he could not escape with the possibility of bringing his action in any other court.

The two positions are exactly illustrated by the cases of Goldey v. Morning News, and Ex parte Wisner, above referred to.

161 The language of the court in the Goldey case intimated that wherever an action was brought under such circumstances that the courts had exercised the jurisdiction given by Congress under the Constitution, to the extent of providing a method by which the United States Court must, if its power were invoked, take charge of the case, such jurisdiction was then exclusive, and should not be relinquished when the parties had not instituted their action by ways which complied with the necessary requirements of the United States Circuit Court. The Wisner case, on the other hand (while holding that the removal statutes had narrowed the jurisdiction of the Circuit Courts, and while applying the rule as to the limitation of jurisdiction as to the particular district of residence, which limitation has since been in effect removed by the case of In re Moore, supra) nevertheless held that if the defendant appeared specially for the purpose of removal, and then raised the question of lack of jurisdiction, and if the plaintiff accepted that contention and asked for remand, the remedy should not be dismissal, but that the Circuit Court should have remanded the case, a mandamus to that effect being granted.

162 It would seem that in the present case no reason has been shown why the Circuit Court of the United States for this district should not try the action between citizens of different states, involving more than the statutory amount, if they are properly brought into court. An application by the defendant, being a non-resident, for removal into this court, precluded him from questioning the jurisdiction of this court over him, if he was properly made a party; but if the defect in acquiring jurisdiction arose through the service of process, and a suit is sought to be maintained which has been instituted by methods which the Circuit Court of the United States cannot support, dismissal should follow.

The corporation in this particular action is an indispensable party, and this court has entire jurisdiction to determine whether or not the suit can proceed with or without this party. We are hence brought down to the necessity of determining what should be done with an action that is not in a condition to proceed, for lack of this indispensable party, where all other elements of jurisdiction exist.

163 The sole question presented in the last analysis upon this motion is whether an action should be dismissed for lack of an indispensable party, when all other elements of juris-

diction over the case are present, and when such dismissal might deprive the plaintiff from maintaining his action in any forum, it being apparent that wherever brought, the suit might be subject to removal into the United States Court, and then to dismissal for the same reason.

The statute providing for the removal of causes was intended to give litigants residing in different States an opportunity to remove cases into a forum which would apply the laws relating to the case in a uniform manner, without reference to where the court might be held. That is, to free the trial of the action from the legal restrictions or conditions of the courts of either party's home. The provision that after removal, the removed case shall proceed as if originally begun in the United States Court, means that from that time on the rights of the parties, provided the case can be considered by the court, are to be interpreted according to their actual positions, when tested by the standards of the laws of the United States, with reference to their claims for relief.

If it were not for the language of Section 5, providing for
164 dismissal or remand "as justice may require", there would be no room for argument. The exercise of the power to remand when justice does require has been established by the cases already cited. As such action is an exercise of discretion, appeal does not lie; while from an order of dismissal on ground of lack of jurisdiction, an appeal may be had. Goldey v. Morning News (supra) at page 520, and Courtney v. Pradt, 196 U. S. 89.

In the present instance, if the word "justice" be interpreted to mean the possibility of bringing the various defendants into court, then remand would be the only remedy. If "justice" means a hearing and disposition of the case by a court having jurisdiction of a controversy between citizens of different states, and also jurisdiction over all of the parties before it, with a determination that no judgment against any defendant can be entered, because an indispensable defendant has not and cannot be made party to the suit, then the present action should be dismissed.

None of the cases cited answer this question. The courts have
remanded actions to the Supreme Court when improperly
165 removed, when the requisite diversity of citizenship has not been shown, when, in general, jurisdiction in the State Court did exist before removal and this has not been ousted by the exercise of the rights given to parties defendant under the removal statute. But no case has been brought to the court's attention where it has been definitely held that (if the jurisdiction of the State Court be terminated by the action of any party under the removal statute, and if the jurisdiction over the cause of action and over the parties before the court be thereby exclusively established in the Circuit Court of the United States for any district) because of hardship alone, or from the standpoint of equitable motives, the legal jurisdiction of the United States Court should be done away with by the court itself. The theory that the words "as justice may require" give the court the power to choose the forum for litigants and dispense with rights created by statute, from motives

of interest or sympathy with the litigants, whose cause of action may be nullified because no court can apply a remedy, is, it is thought, beyond the jurisdiction of a Circuit Court of the United States.

The question is very similar to that raised in cases where
166 service of the parties has been obtained by methods which will not stand the test of the United States Court rules and decisions. Where a party has been sued in a district other than that of his residence, but when the amount involved is sufficient and the parties are citizens of diverse states, it is apparent that some United States Court has jurisdiction of such a cause of action, and that the particular parties to the action are within its jurisdiction, to the extent of determining whether it will proceed to judgment. But if the defect be only that the suit has been instituted in a way which the United States Courts will not recognize as sufficient to allow the entry of judgment, dismissal is the remedy, rather than to exercise jurisdiction in a case in which the court is not satisfied to allow that judgment to be entered in some other forum, with the sanction of the United States Court, upon the very point which it has already determined would not justify a judgment in the United States Court itself. Such cases as have been cited establish the proposition that if jurisdiction exists over the subject matter of the action, but if there is a defect in jurisdiction over the parties, that question of jurisdiction should be determined as if the action
167 had been begun in the United States Circuit Court in the first instance; and the conclusion would seem to be necessary that for this court to send the present action (which is between citizens of different states, which has been properly removed into this district, and which could be determined as between the parties before the court, if no one else were necessary to such determination, and hence in which there is no defect of jurisdiction but simply lack of parties) to a state court for trial, and thereby to hold that such a suit does not properly belong within the jurisdiction of this court, or that there has been improper or collusive joinder of parties, is impossible, and it must be held that the defendants interposing the pleas are entitled to judgment dismissing the action, if the absent party be not brought in within a reasonable time.

(Signed) THOMAS I. CHATFIELD,
U. S. D. J.

168 At a Stated Term of the United States Circuit Court for the Eastern District of New York Held at the Court Rooms in the Post Office Building, in said District, on the 14th Day of September, 1910.

Present: Hon. Thomas I. Chatfield, District Judge sitting as Circuit Judge.

WALTER B. LAWRENCE, Complainant,
against
SOUTHERN PACIFIC COMPANY et als., Defendants.

Upon the opinions heretofore rendered herein, and upon all the papers and proceedings, it is

Ordered that unless the complainant effect service upon the defendant Houston & Texas Central Railway Company within five days from the date hereof, or unless said defendant voluntarily appear herein within such time, that a final decree be entered dismissing the bill herein.

(Signed) THOMAS I. CHATFIELD,
U. S. D. J., Holding the Court.

Endorsed: Order. Filed and entered Sept. 14, 1910.

169 At a Stated Term of the Circuit Court of the United States Held in and for the Eastern District of New York on the 23" Day of September, 1910.

Present: Hon. Thomas I. Chatfield, District Judge holding the Court.

WALTER B. LAWRENCE, Suing on Behalf of Himself and Other Stockholders of the Houston & Texas Central Railway Company Similarly Situated Who May Come in and Contribute to the Expenses of this Action, Complainant,

against

THE SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL Trust Company of New York, Farmers' Loan & Trust Company, Metropolitan Trust Company of the City of New York, The Houston & Texas Central Railroad Company and Houston & Texas Central Railway Company, Defendants.

This matter having come on for argument upon the pleas interposed by the defendants, Southern Pacific Company, The Houston & Texas Central Railroad Company, Central Trust Company of New York, the Farmers' Loan & Trust Company and Metropolitan Trust Company of the City of New York, the complainant's replication thereto, and an agreed statement of facts thereon;

And it appearing therefrom that the defendant, Houston & Texas Central Railway Company is an indispensable party to the action and is not a citizen or resident of the State of New York or of the Eastern District of New York, and that none of its officers are within the jurisdiction of this Court, and that it cannot be served therein with process, and that it will not voluntarily appear in the above entitled action; and the Court having thereafter, and on the 14th
170 day of September, 1910, made an order directing that the bill herein should be dismissed unless the said Houston & Texas Central Railway Company should be served with process or should voluntarily appear on or before the 19th day of September, 1910, and said service or appearance not having been obtained,

Now, after hearing Arthur H. Van Brunt in support of said pleas, and David Gerber, in opposition thereto, and due deliberation having been had;

On motion of Joline, Larkin & Rathbone; Turner, Holston & Horan and Parsons, Closson & McIlvaine, solicitors for the defendants filing pleas herein, it is

Ordered, adjudged and decreed that the pleas of the defendants, Southern Pacific Company, The Houston & Texas Central Railroad Company, Central Trust Company of New York, the Farmers' Loan & Trust Company and Metropolitan Trust Company of the City of New York, be and the same hereby are sustained. And it is further

Ordered, adjudged and decreed: that the motion which was made by the complainant upon the hearing upon said pleas, that the cause should be remanded to the State Court and not dismissed in the event that the Court decided the said Houston & Texas Central Railway Company to be an indispensable party be, and hereby is, denied. And it is further

Ordered, adjudged and decreed that the bill of complaint in the above entitled action be and the same is hereby dismissed with costs to be taxed on the ground that the Court has not jurisdiction to proceed further with the cause for the reason that the Houston & Texas Central Railway Company is an indispensable party to this cause, and cannot be brought in as a party by the complainant or served with process by the complainant and will not voluntarily appear.

THOMAS I. CHATFIELD,
U. S. Dist. Judge, Holding the Circuit Court.

Endorsed: Final Decree. Filed and entered Sept. 23, 1910.

171 United States Circuit Court, Eastern District of New York.

WALTER B. LAWRENCE, Suing on Behalf of Himself and Other Stockholders of the Houston & Texas Central Railway Company Similarly Situated Who May Come in and Contribute to the Expenses of this Action, Complainant,

against

THE SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL Trust Company of New York, Farmers' Loan & Trust Company, Metropolitan Trust Company of the City of New York, The Houston & Texas Central Railroad Company, and Houston & Texas Central Railway, Defendants.

An order or decree having been entered herein on the 1th day of September, 1910, and thereupon and pursuant thereto a final decree having been entered on the 23rd day of September, 1910, dismissing this suit for want of jurisdiction in this Court to try the same;

Now, therefore: This Court, in pursuance of the second paragraph of the fifth section of the Act of Congress, approved March 3, 1891, entitled "An Act to Establish a Circuit Court of Appeals and to define and regulate in said cases the jurisdiction of the Courts of the United States," hereby certifies to the Supreme Court of the United States, that in the above entitled cause, the jurisdiction of this court to proceed with the same was in issue, and was decided adversely to the complainant, and that by reason thereof, and not otherwise, the order or decree of the 14th day of September 1910, and the final decree of September 23rd, 1910, shown in the record

herein, were entered, and that pursuant to said Act above mentioned, the following questions are hereby certified to the Supreme Court:

172 1. Whether the Circuit Court had jurisdiction to proceed with the cause, and whether the Circuit Court had jurisdiction of the cause of action.

2. Whether the Houston & Texas Central Railway Company was an indispensable party to the action.

3. Whether if the Houston & Texas Central Railway Company was an indispensable party to the action and would not appear therein and could not be served with process within the jurisdiction of the Court, the Court thereby lost jurisdiction of the cause of action so that it should dismiss the bill.

4. Whether if the Houston & Texas Central Railway Company was an indispensable party and would not appear and could not be served with process within the jurisdiction of this Court, the cause should have been remanded to the State Court, from whence it was removed.

THOMAS I. CHATFITLD,
U. S. Dist. Judge.

Endorsed: Certificate. Filed Sept. 23, 1910.

173 United States Circuit Court, Eastern District of New York.

WALTER B. LAWRENCE, Suing on Behalf of Himself and Other Stockholders of the Houston & Texas Central Railway Company Similarly Situated Who May Come in and Contribute to the Expenses of this Action, Complainant,

against

THE SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL Trust Company of New York, Farmers' Loan & Trust Company, Metropolitan Trust Company of the City of New York, The Houston & Texas Central Railroad Company, and Houston & Texas Central Railway Company, Defendants.

The above named complainant, conceiving himself to be aggrieved by the decision of this Court that it was without jurisdiction over the cause, for the reason that the Houston & Texas Central Railway Company was an indispensable party and could not be served with process within the jurisdiction of the Court, and would not appear; and by the orders and decrees entered by this Court in pursuance of such decision on the 14th day of September, 1910, and on the 23rd day of September, 1910, does hereby appeal from said final decree of the 23rd day of September, 1910, to the Supreme Court of the United States upon the said question of jurisdiction for the reason specified in the assignment of errors, this day filed herewith; and prays that this appeal may be allowed; that said questions may be certified to the Supreme Court of the United States, and that a

transcript of the record and proceedings herein be forthwith submitted to the Supreme Court of the United States.

Dated N. Y., September 23rd, 1910.

WALTER B. LAWRENCE,
By DITTENHOEFER, GERBER & JAMES,
His Solicitors.

Endorsed: Petition for Appeal. Filed Sept. 23, 1910.

174 United States Circuit Court, Eastern District of New York.

WALTER B. LAWRENCE, Suing on Behalf of Himself and Other Stockholders of the Houston & Texas Central Railway Company Similarly Situated Who May Come in and Contribute to the Expenses of this Action, Complainant,

against

THE SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL Trust Company of New York, Farmers' Loan & Trust Company, Metropolitan Trust Company of the City of New York, The Houston & Texas Central Railroad Company, and Houston & Texas Central Railway Company, Defendants.

Now comes the complainant and files the following assignment of errors upon which he relies, for grounds of reversal on appeal in the above entitled cause:

1. That the Court erred in sustaining the pleas interposed by the defendants, Southern Pacific Company; the Houston & Texas Central Railroad Company; the Central Trust Company of New York, the Farmers' Loan & Trust Company, and the Metropolitan Trust Company of the City of New York.

2. That the Court erred in holding that the Houston & Texas Central Railway Company was an indispensable party to the action.

3. That the Court erred in holding that the Houston & Texas Central Railway Company was an indispensable party to the action, and that the cause must be dismissed for lack of jurisdiction to proceed therein.

4. That the Court erred in denying the complainant's motion to remand the cause to the State Court from whence it was
175 removed, after holding that it had no jurisdiction to proceed with the cause because the Houston & Texas Central Railway Company was an indispensable party to the action.

5. That the Court erred in not holding that it had jurisdiction to proceed with the cause, although the Houston & Texas Central Railway Company would not be a party to the action, and could not be served within the jurisdiction of this court.

WALTER B. LAWRENCE,
By DITTENHOEFER, GERBER & JAMES,
His Solicitors.

Endorsed: Assignment of Errors. Filed Sept. 23, 1910.

176 United States Circuit Court, Eastern District of New York.

WALTER B. LAWRENCE, Suing on Behalf of Himself and Other Stockholders of the Houston & Texas Central Railway Company Similarly Situated Who May Come in and Contribute to the Expenses of this Action, Complainant-Appellant,

against

THE SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL Trust Company of New York, Farmers' Loan & Trust Company, Metropolitan Trust Company of the City of New York, The Houston & Texas Central Railroad Company, and Houston & Texas Central Railway Company, Defendants-Respondents.

Bond for Costs.

Know all men by these presents, That the National Surety Company, a New York corporation, of No. 115 Broadway, Borough of Manhattan, City of New York, is held and firmly bound unto the above named The Southern Pacific Company, Frederic P. Olcott, Central Trust Company of New York, Farmers' Loan & Trust Company, Metropolitan Trust Company of the City of New York, The Houston & Texas Central Railroad Company and Houston & Texas Central Railway Company, in the sum of five hundred ($500.00) dollars, for the payment of which well and truly to be made, it binds itself, its successors and assigns, firmly by these presents.

Sealed with its seal, and dated this 1st day of October, 1910.

Whereas, the above named Walter B. Lawrence, suing on behalf of himself and other stockholders of the Houston & Texas Central Railway Company similarly situated who may come in and contribute to the expenses of this action, has, or is about to prosecute his appeal to the Supreme Court of the United States, to reverse the final decree rendered in the above entitled suit on the 23rd day of September, 1910, by the Circuit Court of the United States for the Eastern District of New York.

Now, therefore, the condition of this obligation is such, that if the above named Walter B. Lawrence, suing on behalf of himself and other stockholders of the Houston & Texas Central Rail-
177 way Company similarly situated who may come in and contribute to the expenses of this action, shall prosecute his appeal to effect, and answer all costs if he fails to make his appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

NATIONAL SURETY COMPANY.
By WM. F. GAYNOR,
Resident Vice-President.

Attest:

M. W. GOWECKE,
Res. Ass't Secretary.

Sealed and delivered, and taken and acknowledged this 1st day of October 1910, before me.

———.

178 *Affidavit, Acknowledgment and Justification by Guarantee or Surety Company.*

STATE OF NEW YORK,
County of New York, ss:

On this 1st day of October, one thousand nine hundred and ten, before me personally came Wm. F. Gaynor, known to me to be the Res. Vice-President of the National Surety Company, the corporation described in and which executed the within and foregoing Bond of Walter B. Lawrence, etc., as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Resident Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company, is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894, that the seal affixed to the within Bond of Walter B. Lawrence, etc., is the corporate seal of said National Surety Company, and was thereto affixed by order and authority of the Board of Directors of said Company, and that he signed his name thereto by like order and authority as Resident Vice-President of said Company, and that he is acquainted with M. W. Gowecke and knows him to be the Resident Assistant Secretary of said Company; and that the signature of said M. W. Gowecke subscribed to said Bond is in the genuine handwriting of said M. W. Gowecke, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of one and one half million dollars.

That —— —— is our agent to acknowledge service in the Judicial District wherein this bond is given.

WM. F. GAYNOR.
(Deponent's signature.)

Sworn to, acknowledged before me, and subscribed in my presence this 1st day of October, 1910.

[L. S.] ADELBERT L. TRAVIS,
Notary Public, etc.
(Officer's signature, description and seal.)

Endorsed: Appeal Bond. The within undertaking on appeal is hereby approved as to sufficiency & form. October 1, 1910. Thomas I. Chatfield, U. S. D. J. Filed October 1st, 1910.

179 At a Stated Term of the Circuit Court of the United States, held in and for the Eastern District of New York, on the 23d day of September, 1910.

Present: Hon. Thomas I. Chatfield, Judge.

WALTER B. LAWRENCE, Suing on Behalf of Himself and Other Stockholders of the Houston & Texas Central Railway Company Similarly Situated Who May Come in and Contribute to the Expenses of this Action, Complainant,

against

THE SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL Trust Company of New York, Farmers' Loan & Trust Company, Metropolitan Trust Company of the City of New York, The Houston & Texas Central Railroad Company, and Houston & Texas Central Railway Company, Defendants.

Now comes the complainant by his solicitors, and it appearing to the Court that the petition for appeal and assignments of error have been filed herein; it is

Ordered: That an appeal to the Supreme Court of the United States from the final decree entered herein on the 23rd day of September, 1910, be, and the same is allowed upon the question of jurisdiction of this Court over the cause of action; and that for the purpose of enabling the Supreme Court of the United States to decide this question, a transcript of the record herein be forthwith submitted to the Supreme Court, and that the complainant file an appeal bond in the sum of Five hundred Dollars with a suitable person or corporation, as surety.

THOMAS I. CHATFIELD,
U. S. D. J.

Endorsed: Order allowing appeal. Filed and entered Sept. 23, 1910.

180 UNITED STATES OF AMERICA,
Eastern District of New York, ss:

I, B. Lincoln Benedict, Clerk of the Circuit Court of the United States for the Eastern District of New York, in the Second Judicial Circuit, do hereby certify that the foregoing is a true transcript of the record on removal, rule, notice of first motion to remand, opinion on first motion to remand, order denying first motion to remand, appearances, pleas, replications to pleas, notice of second motion to remand and affidavit, order denying second motion to remand, order to show cause and affidavit on motion to dismiss, opinion on motion to dismiss, order denying motion to dismiss, agreed statement of facts, opinion on pleas, order, final decree, certificate of Judge and appeal papers, made up to be transmitted to the Supreme Court of the United States on appeal of the complainant, in the suit wherein Walter B. Lawrence, suing on behalf of himself and other stockholders of the Houston & Texas Central Railway Company similarly

situated who may come in and contribute to the expenses of this action, is complainant, and the Southern Pacific Company, Central Trust Company of New York, Farmers' Loan & Trust Company, Metropolitan Trust Company of the City of New York, The Houston & Texas Central Railroad Company and Houston & Texas Central Railway Company are defendants.

181 In witness whereof I have hereunto set my hand and the seal of this court, the 7th day of November, 1910.

[The Seal of the Circuit Court, Eastern District of New York.]

B. LINCOLN BENEDICT, *Clerk.*

182 United States Circuit Court, Eastern District of New York.

WALTER B. LAWRENCE, Suing on Behalf of Himself and Other Stockholders of the Houston & Texas Central Railway Company Similarly Situated Who May Come in and Contribute to the Expenses of this Action, Complainant,

against

THE SOUTHERN PACIFIC COMPANY, CENTRAL TRUST COMPANY OF New York, Farmers' Loan & Trust Company, Metropolitan Trust Company of the City of New York, The Houston & Texas Central Railroad Company, and Houston & Texas Central Railway Company, Defendants.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Southern Pacific Company, Central Trust Company of New York, Farmers' Loan & Trust Company, Metropolitan Trust Company of the City of New York, The Houston & Texas Central Railroad Company, and Houston & Texas Central Railway Company:

You and each of you are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, District of Columbia, thirty (30) days after the date of this citation, pursuant to an appeal filed in the Clerk's office of the United States Circuit Court, for the Eastern District of New York, wherein Walter B. Lawrence, suing on behalf of himself and other stockholders of the Houston & Texas Central Railway Company, similarly situated, who may come in and contribute to the ex-

183 penses of this action, is complainant, and The Southern Pacific Company, Central Trust Company of New York, Farmers' Loan & Trust Company, Metropolitan Trust Company of the City of New York, The Houston & Texas Central Railroad Company and Houston & Texas Central Railway Company, to show cause, if any there be, why the final decree entered against the said complainant on the 23rd day of September, 1910, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Brooklyn in the Eastern

District of New York this 10th day of October, A. D., Nineteen hundred and ten, and of the Independence of the United States, One hundred and thirty-fifth.

THOMAS I. CHATFIELD,
United States District Judge Holding the Circuit Court.

Attest:

[The Seal of the Circuit Court, Eastern District of New York.]

B. LINCOLN BENEDICT, *Clerk,*
By J. G. COCHRAN,
Deputy Clerk.

184 Due and timely service of this citation is hereby acknowledged on behalf of the Southern Pacific Company, Central Trust Company of New York, and Houston & Texas Central Railroad Company, this — day of October, 1910.

Received a copy of this paper Oct. 11, 1910.

JOLINE, LARKIN & RATHBONE,
Solicitors and of Counsel for Southern Pacific Company et al.

Due and timely service of this citation is hereby acknowledged on behalf of Farmers' Loan & Trust Company, this — day of October, 1910.

Copy of the within paper received Oct. 11, 1910.

GELLER, ROLSTON & HORAN,
Att'ys for F. L. & T. Co.,
Solicitors for Farmers' Loan & Trust Company.

Due and timely service of this citation is hereby acknowledged on behalf of Metropolitan Trust Company of the City of New York, this 11 day of October, 1910.

PARSONS, CLOSSON & McILVAINE,
Solicitors for Metropolitan Trust Company of the City of New York.

185 [Endorsed:] Eq. 5/60. United States Circuit Court, Eastern District of New York. Walter B. Lawrence, suing on behalf of himself, etc., Complainant, against The Southern Pacific Company, et al., Defendants. Original Citation. Ret'ble Nov. 10/10. Dittenhoeffer, Gerber & James, Attorneys for Plaintiff, 96 Broadway, Borough of Manhattan, New York. Due service of a copy of the within admitted. 7. Received and filed October 17, 1910. E. M.

186 [Endorsed:] Supreme Court of the United States. Walter B. Lawrence suing on behalf of himself and other stockholders of the Houston and Texas Central Railway Company similarly situated who may come in and contribute to the expenses of this action Appellant, versus Southern Pacific Company, Central Trust Company of New York, Farmers' Loan and Trust Company, Metropolitan Trust Company of the City of New York, The Houston and Texas Central Railroad Company, and Houston and Texas Cen-

tral Railway Company appellees. Record. Dittenhoeffer, Gerber & James, Solicitors for Appellant. Joline, Larkin & Rathbone, Solicitors for Appellees, Southern Pacific Company, Central Trust Company of New York, and The Houston & Texas Central Railroad Company. Geller, Rolston & Horan, Solicitors for Appellee, Farmers Loan & Trust Company. Parsons, Closson & McIlvaine, Solicitors for Appellee, Metrpolitan Trust Company of the City of New York. Appeal from the Circuit Court of the United States for the Eastern District of New York.

Endorsed on cover: File No. 22,398. E. New York C. C. U. S. Term No. 777. Walter B. Lawrence, suing on behalf of himself and other stockholders of the Houston & Texas Central Railway Company similarly situated who may come in and contribute to the expenses of the action, appellant, vs. The Southern Pacific Company et al. Filed November 12th, 1910. File No. 22,398.

Supreme Court of the United States

October Term, 1910.

No. 777.

WALTER B. LAWRENCE, suing on behalf of himself and other stockholders of the Houston and Texas Central Railway Company similarly situated who may come in and contribute to the expenses of this action,

Appellant,

against

SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL TRUST COMPANY OF NEW YORK, FARMERS LOAN AND TRUST COMPANY, METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, THE HOUSTON AND TEXAS CENTRAL RAILROAD COMPANY AND HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY,

Appellees.

SIRS:

PLEASE TAKE NOTICE: That upon the annexed petition, and upon the record in the above entitled cause, filed in the Office of the Clerk of this Court, the undersigned will move this Court at a Stated Term, to be held in the Capitol of the United States, in the City of Washington, District of Columbia, on the 30th day of January, 1911, at the opening of Court on that day, or as soon thereafter as counsel can be heard, for an order

advancing this cause and setting the same down for an early hearing, pursuant to Rule 32 of the Rules of the Supreme Court of the United States, on the ground that the only question at issue is the question of the jurisdiction of the Court below to hear the cause, and for such other and further relief as to the Court may seem just

A. J. DITTENHOEFER,
DAVID GERBER,
H. SNOWDEN MARSHALL,
Counsel for Appellant.

To:

Arthur H. Van Brunt, Esq.,
Counsel for:
Southern Pacific Co.,
Frederic P. Olcott,
Central Trust Co. of N. Y.,
Houston & Texas Central Railroad Co.

Frederick Geller, Esq.,
Counsel for Farmers' Loan & Trust Co.

Tompkins McIlvaine, Esq.,
Counsel for Metropolitan Trust Co. of
the City of N. Y.

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1910. *No.* 777.

WALTER B. LAWRENCE, suing on behalf of himself and other stockholders of the Houston and Texas Central Railway Company similarly situated who may come in and contribute to the expenses of this action,

Appellant,

against

SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL TRUST COMPANY OF NEW YORK, FARMERS LOAN AND TRUST COMPANY, METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, THE HOUSTON AND TEXAS CENTRAL RAILROAD COMPANY AND HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY,

Appellees.

And now comes Walter B. Lawrence, suing on behalf of himself and other stockholders of the Houston & Texas Central Railway Company, similarly situated, who may come in and contribute to the expenses of this action, by Abram J. Dittenhoefer, David Gerber and H. Snowden Marshall, his solicitors and counsel, and moves this Court to advance the above entitled action for a hearing at an early date convenient to this Court, and respectfully shows to the Court:

That this action is brought to have it adjudged and decreed that the defendant, the Southern Pacific Railway Company, acquired and hold Ten million dollars, par value, of the capital stock of the Houston & Texas Central Railway Company, and all profits and earning

which it has received or may receive from holding said stock as Trustee for the plaintiff and other minority stockholders of the Houston & Texas Central Railway Company, who may come in and contribute to the expenses of this action, and that an accounting be had and the Southern Pacific Company be required to account for all stocks, moneys and property which it has received or acquired in pursuance or because of the execution of a certain reorganization agreement referred to in the complaint, and that on such accounting the Southern Pacific Company be credited with such moneys as it has paid out on account of its guarantees and expenses in carrying out the said reorganization agreement, that it be decreed to hold the balance in trust to be ratably distributed to every stockholder of the Houston & Texas Central Railway Company in proportion to the holding of such shareholder of stock of the said Railway Company, and further that it be adjudged that none of the defendants, the Central Trust Company, Farmers' Loan & Trust Company, Metropolitan Trust Company or said Frederic P. Olcott have any beneficial interest or ownership in the lands conveyed to the said trust companies by the said Frederic P. Olcott after the fulfillment and completion of all the purposes of the trust indentures made by the said Olcott, and that the surplus of said lands, if any, be transferred, assigned and delivered by proper deeds to the defendant the Houston & Texas Central Railway Company, and, further, that an injunction issue, perpetually restraining and enjoining the said Southern Pacific Company, Frederic P. Olcott, and all other persons acting under them, from in any way encumbering, pledging, hypothecating, mortgaging, transferring or conveying any of the capital stock of the Houston & Texas Central Railway Company, or the certificates thereof, or property, real or personal, acquired by them, or either of them, under and pursuant to or in furtherance of said reorganization agreement mentioned and referred to in this bill of complaint.

That the said action was originally brought in the Supreme Sourt of the State of New York, the venue laid in Queens County, and was thereafter removed to the United States Circuit Court for the Eastern District of New York by the defendant the Southern Pacific Company, the Houston & Texas Central Railroad Company and Frederic P. Olcott.

That thereafter a motion was made by the complainant to remand the said case to the State Court, which was denied. That thereafter pleas were filed by the defendants Southern Pacific Company, Frederic P. Olcott, Houston & Texas Central Railroad Company, Central Trust Company of New York, Farmers' Loan & Trust Company, and the Metropolitan Trust Company of the City of New York to the jurisdiction of the Court on the ground that the Houston & Texas Central Railway Company was a corporation organized and existing under the laws of the State of Texas, and a citizen and resident of that State, and a non-resident of the Eastern District of New York; that the said Railway Company was named as a defendant in the bill of complaint herein; that the Circuit Court had no jurisdiction over the said Company; that the said Company was a proper, necessary and indispensable party to this suit, and that the said Company had not been, and being a citizen of Texas, cannot be, brought by process within the jurisdiction of this Court and had not subjected itself to the jurisdiction of this Court by voluntary appearance or otherwise, and that in the absence of the said Railway Company, full, complete and final determination of this suit or controversy could not be had.

That after the defendants had filed their plea to the jurisdiction of the Court, another motion was made by the complainant to remand the said case to the State Court, which was also denied. Thereafter the case came on for hearing before the Hon. Thomas I. Chatfield, District Judge of the Eastern District of New York, upon said

plea to the Court's jurisdiction and agreed statement of facts, and the said Judge thereafter, on the 23rd day of September, 1910, signed a final decree ordering, adjudging and decreeing that the pleas of the said defendants be sustained, that the motions made by the complainant upon the hearing of said pleas to remand the cause to the State Court, and not to dismiss it in the event that the Court decided that the Houston & Texas Central Railway Company was an indispensable party should be denied, and that the bill of complaint herein should be dismissed on the ground that the Court had no jurisdiction to proceed further with the cause, for the reason that the Houston & Texas Central Railway Company was an indispensable party to this cause and could not be brought in as a party by the complainant and would not voluntarily appear.

That thereafter, and on the 23rd day of September, 1910, the said District Judge signed a certificate whereby he certified to this Court that in the above entitled cause the jurisdiction of the Circuit Court to proceed with the same was at issue, and was decided adversely to the complainant, and in pursuance to the Acts of Congress in such cases made and provided, he certified the following questions to the Court:

1. Whether the Court had jurisdiction to proceed with the cause, and whether the Circuit Court had any jurisdiction in the cause of action.

2. Whether the Houston & Texas Central Railway Company was an indispensable party to the action.

3. Whether, if the Houston & Texas Central Railway Company was an indispensable party to the action and would not appear therein and could not be served with process within the jurisdiction of the Court, the Court thereby lost jurisdiction of the cause of action so that it should dismiss the bill.

4. Whether, if the Houston & Texas Central Railway Company was an indispensable party and would not

appear and could not be served with process within the jurisdiction of this Court, the cause should be remanded to the State Court from whence it was removed.

That thereafter the said appellant duly filed his petition for leave to appeal to this Court, and assignments of error herein, which said appeal was, on the 23rd day of September, 1910, allowed by the said Hon. Thomas I. Chatfield, District Judge for the Eastern District of New York, upon the question of the jurisdiction of the Circuit Court over the cause of action.

That thereafter a citation directed to the defendants herein was duly issued by the said Hon. Thomas I. Chatfield, United States District Judge for the Eastern District of New York, and a transcript of the record duly filed in the office of the Clerk of this Court, and the case docketed and numbered 777 in the October Term, 1910.

That all of the foregoing facts will fully and at large appear from the transcript of record filed in this Court in this suit.

That in this case the appellant is entitled to an order advancing the argument under the provisions of Rule VI and Rule 32 of this Court, as it is a case in which the sole question involved is one of jurisdiction.

Your petitioner therefore prays that this Honorable Court may advance said case, and set it down for an early hearing, during the October Term, 1910.

A. J. DITTENHOEFER,
DAVID GERBER,
H. SNOWDEN MARSHALL,

Walter B. Lawrence.
Counsel for Petitioner,

Supreme Court of the United States,

October Term, 1911.

No. 135.

WALTER B. LAWRENCE, suing on behalf of himself and other Stockholders of the Houston and Texas Central Railway Company, similarly situated who may come in and contribute to the expenses of this action,

Appellant,

against

SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL TRUST COMPANY OF NEW YORK, FARMERS' LOAN AND TRUST COMPANY, METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, THE HOUSTON AND TEXAS CENTRAL RAILROAD COMPANY and HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY,

Appellees.

MOTION FOR LEAVE TO ADVANCE.

A. J. DITTENHOEFER,
DAVID GERBER,
H. SNOWDEN MARSHALL,
Counsel for Appellant.

[illegible] STREET TO BARCLAY STREET. [illegible]

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Supreme Court of the United States

OCTOBER TERM, 1911.—No. 431.

WALTER B. LAWRENCE, suing on behalf of himself and other stockholders of the Houston and Texas Central Railway Company, similarly situated, who may come in and contribute to the expenses of this action,

Appellant,

against

SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL TRUST COMPANY OF NEW YORK, FARMERS' LOAN AND TRUST COMPANY, METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, THE HOUSTON AND TEXAS CENTRAL RAILROAD COMPANY and HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY,

Appellees.

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Sirs:

Please take notice that upon the annexed petition and the transcript of record in the above-entitled cause, filed in the office of the Clerk of this Court, and upon the papers served heretofore upon you in connection with a motion to advance this cause, made January 30th, 1911, the undersigned will move

this Court, at a Stated Term, to be held in the Capitol of the United States, in the City of Washington, District of Columbia, on the 13th day of November, 1911, at the opening of Court on that day, or as soon thereafter as counsel can be heard, for leave to renew said motion to advance and for an order advancing this cause and directing the same to be submitted upon briefs, without oral argument, pursuant to Rule 32 of the Rules of the Supreme Court of the United States, on the ground that the only question at issue is the question of the jurisdiction of the Court below to hear the cause, and for such other and further relief as to the Court may seem proper.

Dated New York, October 20th, 1911.

Yours, &c.,

A. J. DITTENHOEFER,
DAVID GERBER,
H. SNOWDEN MARSHALL,
Counsel for Appellant.

To

ARTHUR H. VAN BRUNT, Esq.,
Counsel for:
Southern Pacific Company,
Frederic P. Olcott,
Central Trust Company of New York,
Houston & Texas Central Railroad Company.

FREDERICK GELLER, Esq.,
Counsel for Farmers' Loan and Trust Company.

TOMPKINS MCILVAINE, Esq.,
Counsel for Metropolitan Trust Company of the City of New York.

SUPREME COURT OF THE UNITED STATES. 7

OCTOBER TERM, 1911—No. 431.

WALTER B. LAWRENCE, suing on behalf of himself and other stockholders of the Houston and Texas Central Railway Company, similarly situated, who may come in and contribute to the expenses of this action,

Appellant,

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against

SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL TRUST COMPANY OF NEW YORK, FARMERS' LOAN AND TRUST COMPANY, METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, THE HOUSTON AND TEXAS CENTRAL RAILROAD COMPANY, and HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY,

Appellees.

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And now comes WALTER B. LAWRENCE, and for his petition to the Court in the above-entitled cause, respectfully shows to this Honorable Court as follows:

First.—This is a case in which the appellant is entitled to apply for an order advancing the cause under the provisions of Rule 32 of this Court.

The case is brought to this Court by appeal under Section 5 of the Act of March 3d, 1891, Chapter 517,

and the only question in issue is the question of the jurisdiction of the Court below.

Upon this ground a motion was heretofore and on the 30th day of January, 1911, made to advance this cause, and said motion was thereafter and on the 20th day of February, 1911, denied by the Court. Your petitioner is advised that the memorandum opinion denying the said motion reads as follows: "Motion to advance is denied, but cause will be taken on submission of printed briefs, if all parties are so advised."

After this decision, counsel for the appellees declined to agree to submit the case on briefs, so that the cause was not advanced. The appeal, as your petitioner is advised, cannot, in the ordinary course, be heard for at least a year. The question involved is simply one of the jurisdiction of the Circuit Court, as appears from the certificate of Judge Chatfield at pages 81 and 82 of the transcript of record herein. The facts involved in the case are fully set forth in the previous petition for an order advancing the cause, to which petitioner makes reference, and which motion he now begs permission to renew.

Your petitioner asks leave to renew the said motion because it is his belief that in making said motion a misunderstanding occurred, and counsel for the petitioner did not convey to the Court the impression which he intended to convey on the question of whether the case should be set down for oral argument or submitted on briefs.

When the said motion to advance was made, counsel for the appellees submitted a memorandum in which they asked that if the cause be advanced it should not be submitted on briefs, but that the Court should hear oral argument. When the motion was called, it was submitted to this Honorable Court by Russell H. Landale, Esq., for the

appellant; and Joel F. Veile, Esq., for the appellees, stated to the Court that he wished to apply for an oral argument. The Chief Justice then asked Mr. Landale what he had to say in reference to said application, and Mr. Landale stated to the Court that he had no objection to an oral argument. 13

Mr. Landale did not intend to convey to the Court the impression that he also asked for an oral argument. He intended to convey to the Court the idea that he pressed his motion for the advancing of the cause under Rule 32, but was willing that this Honorable Court, if it saw fit, should grant the application of the other side, and hear an oral argument.

From the language of the Court, above quoted, denying the motion to advance the cause, your petitioner came to the conclusion that the Court received the impression that he only moved for an advance of the cause provided the Court would grant an oral argument; whereas your petitioner's said counsel intended to convey to the Court that he wished to press his motion to advance the cause, but had no objection, to accede to the request of the appellees that there should be an oral argument if this Honorable Court saw fit to grant it. 14

Petitioner submits that under the provisions of Rule 32 he is entitled to apply to have the certified question of jurisdiction advanced over other causes, and from the foregoing facts has derived the impression that his former motion to advance would have been granted, but for the misunderstanding which has been above described. 15

On these grounds, your petitioner asks leave to renew his motion to advance the cause, to be disposed of by the submission of briefs, or by oral argument, as to this Court may seem fit. But in any event your petitioner begs leave to press his

motion for the application of Rule 32 to the record in this case.

WALTER B. LAWRENCE.

A. J. DITTENHOEFER,
DAVID GERBER,
H. SNOWDEN MARSHALL,
Counsel for Petitioner.

No. 165.

Supreme Court of the United States.

OCTOBER TERM, 1911.

WALTER B. LAWRENCE, suing on behalf of himself, etc.,
Appellant,

against

SOUTHERN PACIFIC COMPANY, *et al*,
Appellees.

PETITION AND NOTICE OF MOTION.

A. J. DITTENHOEFER,
DAVID GERBER and
H. SNOWDEN MARSHALL,
Counsel for Appellant.

New York:
Stillman Appellate Printing Co.
1912.

Supreme Court of the United States, 1

OCTOBER TERM, 1911.

WALTER B. LAWRENCE, suing on behalf of himself and other stockholders of the Houston and Texas Central Railway Company, similarly situated, who may come in and contribute to the expenses of this action,

Appellant,

against 2

SOUTHERN PACIFIC COMPANY, Frederic P. Olcott, Central Trust Company of New York, Farmers' Loan & Trust Company, Metropolitan Trust Company of the City of New York, the Houston & Texas Central Railroad Company and Houston & Texas Central Railway Company,

Appellees.

} No. 431.

Sirs: 3

Please take notice that upon the annexed petition and a transcript of the record in the above entitled action, filed in the office of the Clerk of this Court, the undersigned will move this Court at a Stated Term to be held at the

Capitol of the United States in the City of Washington, District of Columbia, on the 25th day of March, 1912, at the opening of Court on that day, or as soon thereafter as counsel can be heard, for an order granting leave to Henry L. Bogert, Townsend Lawrence and Anita Lawrence as Executors of the last Will and Testament of Walter B. Lawrence, deceased, to come in and be admitted as parties appellant to this suit, in place and stead of Walter B. Lawrence, deceased, pursuant to Rule 15 of the Rules of this Court, and for such other and further relief as to the Court may seem just.

Dated, New York, March 8th, 1912.

Yours, etc.,

A. J. DITTENHOEFER,
DAVID GERBER,
H. SNOWDEN MARSHALL,
Counsel for Appellant.

To

ARTHUR H. VAN BRUNT, Esq.,
Counsel for Appellees:
Southern Pacific Company,
Frederic P. Olcott,
Central Trust Company of New York,
Houston & Texas Central Railroad Company.

FREDERICK GELLER, Esq.,
Counsel for Appellee Farmers' Loan & Trust Company.

TOMPKINS MCILVAINE, Esq.,
Counsel for Appellee Metropolitan Trust Company of the City of New York.

SUPREME COURT OF THE UNITED STATES, 7

OCTOBER TERM, 1911.

WALTER B. LAWRENCE, suing on behalf of himself and other stockholders of the Houston and Texas Central Railway Company, similarly situated, who may come in and contribute to the expenses of this action,

Appellant,

against 8

SOUTHERN PACIFIC COMPANY, Frederic P. Olcott, Central Trust Company of New York, Farmers' Loan & Trust Company, Metropolitan Trust Company of the City of New York, the Houston & Texas Central Railroad Company and Houston & Texas Central Railway Company,

Appellees.

No. 431.

Now comes Henry L. Bogert, Townsend Lawrence and Anita Lawrence, as Executors of the last Will and Testament of Walter B. Lawrence, deceased, and for their petition to the Court in the above entitled cause, respectfully show to this Honorable Court as follows: 9

FIRST: That the above entitled cause is now pending in this Court, and its number is 431 on the October Term,

1911 Calendar, having been brought to this Court by appeal under Section 5 of the Act of March 3rd, 1891, Chapter 517, the only question in issue being the question of the jurisdiction of the Court below.

SECOND: That Walter B. Lawrence, the appellant, died on the 12th day of January, 1912, at Flushing, in the County of Queens, State of New York, leaving a last Will and Testament, which was duly admitted to probate by the Surrogates' Court of the County of Queens, State of New York, on the 25th day of January, 1912, and that thereafter Letters Testamentary were duly issued to your petitioners, Henry L. Bogert, Townsend Lawrence and Anita Lawrence, and that your petitioners duly qualified as such Executors, and have been and are now acting as such.

On these grounds your petitioners ask leave to come in and be admitted as parties appellant to this suit, in the place and stead of Walter B. Lawrence, deceased, pursuant to Rule 15 of the Rules of this Court.

Dated, New York, March 8th, 1912.

HENRY L. BOGERT,
TOWNSEND LAWRENCE,
ANITA LAWRENCE,
As Executors of the last Will and Testament of Walter B. Lawrence, deceased,
Petitioners.

A. J. DITTENHOEFER,
DAVID GERBER,
H. SNOWDEN MARSHALL,
Counsel for Petitioners.

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Supreme Court of the United States,

OCTOBER TERM, 1911.

No. 165.

WALTER B. LAWRENCE, suing on behalf of himself and other stockholders of the Houston and Texas Central Railway Company, similarly situated, who may come in and contribute to the expenses of the action,

Appellant,

vs.

THE SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL TRUST COMPANY OF NEW YORK, FARMERS' LOAN AND TRUST COMPANY, METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, THE HOUSTON AND TEXAS CENTRAL RAILROAD COMPANY and HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY,

Appellees.

Memorandum on Behalf of Appellees, The Southern Pacific Company, The Houston and Texas Central Railway Company, and Central Trust Company of New York on Renewal of Motion to Advance.

On January 30, 1911, motion to advance this cause under the provisions of rule 32 of this court was sub-

mitted and on February 20, 1911, the following memorandum denying the motion was filed:

> "Motion to advance is denied, but cause will be taken on submission of printed briefs if all parties are so advised."

Thereafter no proceedings were taken on behalf of the appellant until on October 21st, 1911, seven months after the decision of the former motion, when notice of the present application to advance was served upon counsel for the appellees. The present application contains nothing upon the merits not found in the former application. The position of the appellees in regard thereto was fully set forth in their memorandum filed on the return day of the original motion. A copy of such memorandum is annexed hereto and marked Exhibit "A," and it is prayed that the same will be considered as incorporated in full herein.

The renewal of the motion is based upon an alleged misunderstanding by this Court of the attitude of the applicant in regard to an oral argument. It is submitted that if the situation set forth in the motion papers did exist, then the renewal of the motion should have been promptly made and the delay from February to November in making the same constitutes extreme *laches* and this Court should not entertain an application to speed the cause where the parties interested themselves have been so dilatory.

The cause has been on the docket of this Court for nearly a year and no excuse is made in the motion papers for the delay in remaking the motion, or is it claimed that the applicant will be in any way prejudiced by awaiting the hearing of the cause in its regular order.

Under the circumstances we submit that this Court should not excuse the *laches* of the complainant and grant its request to advance the cause, particularly if the granting of the motion would compel the submission of the cause without argument. The attitude of

this Court toward applications showing laches is well illustrated by the remark of the late Chief Justice FULLER in *Hammond vs. Hopkins*, 143 U. S., 224 (274):

> "The hour glass must supply the ravages of the scythe and those who have slept upon their rights must be remitted to the repose from which they should not have been aroused."

We urge upon all the grounds set forth in the brief submitted upon the original motion that an oral argument is extremely desirable and should be had. That by a denial of the present motion such argument would be afforded the parties as a matter of course, while if this motion were granted an oral presentation would come as a matter of favor.

It is, therefore, submitted, that as the appeal involves an extremely interesting jurisdictional point oral argument should be had therein in order that the contentions of the parties may be fully presented to the Court.

Respectfully submitted,

ARTHUR H. VAN BRUNT,

Counsel for the Appellees The Southern Pacific Company, The Houston and Texas Central Railroad Company and Central Trust Company of New York.

"A."

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1910.

No. 777.

WALTER B. LAWRENCE, suing on behalf of himself and other stockholders of the Houston and Texas Central Railway Company, similarly situated, who may come in and contribute to the expenses of the action,

Appellant,

vs.

THE SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL TRUST COMPANY OF NEW YORK, FARMERS' LOAN AND TRUST COMPANY, METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, THE HOUSTON AND TEXAS CENTRAL RAILROAD COMPANY and HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY,

Appellees.

Memorandum on Behalf of Appellees The Southern Pacific Company, The Houston and Texas Central Railroad Company and Central Trust Company of New York, on Motion to Advance.

The present case is brought to this Court, on appeal from the Circuit Court of the United States for the

Eastern District of New York under section 5 of the act of March 3, 1891 (chap. 517), upon the ground that the only question in issue is the question of the jurisdiction of the Court below.

This motion is to advance the case under the provisions of Rule 32 of this Court.

The only point that these defendants desire to urge on this motion is that, by reason of the nature of the questions involved upon the present appeal, the case should be set down for oral argument.

The action was originally instituted by the complainant Lawrence, suing as a stockholder of the Houston and Texas Central Railway Company, in the right of that corporation, in the Supreme Court of the State of New York for the County of Queens. The complaint asked for an accounting and for other relief, and alleged a demand upon the Railway Company to bring the action and a refusal on its part so to do. The Houston and Texas Central Railway Company was named as a party defendant in the action, but has never been served with process and has not appeared.

After process had been served upon all the defendants other than the Railway Company, the action was removed to the Circuit Court of the United States for the Eastern District of New York upon the ground of diversity of citizenship. Two motions to remand the case to the state court were made by the complainant, both of which were denied by the circuit court.

The defendants named in the complaint, other than the defendant Olcott, who had died in the meantime, and the Houston and Texas Central Railway Company, which had never been served with process, thereupon filed pleas in bar to the bill of complaint setting up that the Railway Company was an indispensable party to the action, that it had not been and could not be subjected to the jurisdiction of the court by reason of the fact that it was a foreign corporation not carrying on any business within the State of New York, and that the action could not proceed in its absence. Issue was joined upon the pleas, and the case heard

upon an agreed statement of facts, appearing at pages 66 to 70 of the record.

The circuit court sustained the pleas and dismissed the bill, denying the complainant's motion to remand the case to the state court (*opinion of* CHATFIELD, J., *Record*, p. 70; 180 Fed., 822).

The question thus presented for decision to the circuit court was this: Where an action is instituted in the state court against several defendants, one of whom is an indispensable party defendant but who has not been served with process, and the action is removed to the United States Circuit Court, all the necessary elements of federal jurisdiction being present in the diversity of citizenship of the indispensable parties, jurisdiction over the persons of the defendants who are before the court and over the subject matter of the action, should the action be dismissed by reason of the absence of the indispensable party, or should it be remanded to the state court?

On the one hand we have the provision of section 3 of the removal act (Act March 3, 1887, c. 373, 24 Stat., 555, and Act Aug. 13, 1888, c. 866, 25 Stat., 436; U. S. Comp. Stat., 1901, p. 510), that, upon the removal of a case to the circuit court, "the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court," and the similar provision of section 6 that, in all cases removed under the provisions of the act, the circuit court shall "proceed therein as if the suit had been originally commenced in said circuit court; and, on the other hand, the provision of section 5 "that if, in any suit * * * removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been * * * removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, * * * the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require * * *."

The claim was made on behalf of complainant in the court below that, under the last clause of section 5 of the act quoted above, the case should have been remanded to the state court, because the federal court could not proceed to a determination of the case upon the merits by reason of the absence of an indispensable party over whom it was impossible, under the established rules of federal procedure, to obtain jurisdiction, and that, therefore, "justice required" the remand to the state court, where jurisdiction could be obtained by publication.

We believe that the court below was right in holding that the statute should not be construed in this sense, and that the word "justice" must be interpreted to mean, not "the possibility of bringing the various defendants into court," but "a hearing and disposition of the case by a court having jurisdiction of a controversy between citizens of different states, and also jurisdiction over all the parties before it, with a determination that no judgment against any defendant can be entered, because an indispensable defendant has not and cannot be made party to the suit" *(Record*, p. 78).

Any other construction would nullify the language of sections 3 and 6 of the act to the effect that upon removal to the circuit court the case shall proceed as if originally commenced therein. As stated by the court below, however, this question has never been decided except in the case at bar *(Record*, p. 78), and it is submitted that the appeal should be set down for oral argument, in order that the point involved may be fully presented to the Court.

Respectfully submitted,

ARTHUR H. VAN BRUNT,

Counsel for Appellees The Southern Pacific Company, The Houston and Texas Central Railroad Company and Central Trust Company of New York.

Supreme Court of the United States.

OCTOBER TERM, 1911—No. 465.

WALTER B. LAWRENCE, suing on behalf of himself and other Stockholders of the Houston and Texas Central Railway Company, similarly situated who may come in and contribute to the expenses of this action,

Appellant,

against

SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL TRUST COMPANY OF NEW YORK, FARMERS' LOAN & TRUST COMPANY, METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, THE HOUSTON & TEXAS CENTRAL RAILROAD COMPANY and HOUSTON & TEXAS CENTRAL RAILWAY COMPANY,

Appellees.

MEMORANDUM ON BEHALF OF THE APPELLEE, METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK.

TOMPKINS MCILVAINE,
Solicitor and Counsel for Appellee,
Metropolitan Trust Company
of the City of New York.

New York:
Stillman Appellate Printing Co.
1911.

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 431.

WALTER B. LAWRENCE, suing on behalf of himself and other Stockholders of the Houston and Texas Central Railway Company, similarly situated who may come in and contribute to the expenses of this action,

Appellant,

against

SOUTHERN PACIFIC COMPANY, Frederic P. Olcott, Central Trust Company of New York, Farmers' Loan & Trust Company, Metropolitan Trust Company of the City of New York, The Houston & Texas Central Railroad Company and Houston & Texas Central Railway Company,

Appellees.

To the Honorable Justices of the Supreme Court of the United States:

The Metropolitan Trust Company of the City of New York, one of the appellees herein, by Tomp-

kins McIlvaine, its solicitor and counsel, joins in the memorandum submitted on the motion herein on behalf of the appellees, The Southern Pacific Company, the Houston & Texas Central Railroad Company and Central Trust Company of New York, and respectfully requests this Court that if the hearing in the above entitled action be advanced as requested by the appellant, counsel to said Metropolitan Trust Company may be permitted to make oral argument on the merits of the appeal heretofore taken herein by the said appellant, at such date as may be convenient to this Court.

This appellee desires to call the attention of the Court to the laches on the part of the appellant in making the present motion for leave to renew his motion, heretofore made on the 30th day of January, 1911, to advance the present cause. The decision of this Court, denying said motion, was rendered on the 20th day of February, 1911. More than eight months elapsed between the rendering of said decision by this Court and service upon this appellant of the papers for the present motion.

TOMPKINS MCILVAINE,
Solicitor & Counsel for Appellee,
Metropolitan Trust Company
of the City of New York.

WOODHULL HAY,
Of Counsel.

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Supreme Court of the United States,

OCTOBER TERM, 1910—No. [redacted] 165

WALTER B. LAWRENCE, suing on behalf of himself and other Stockholders of the Houston and Texas Central Railway Company, similarly situated who may come in and contribute to the expenses of this action,

Appellant,

against

SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL TRUST COMPANY OF NEW YORK, FARMERS' LOAN & TRUST COMPANY, METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, THE HOUSTON & TEXAS CENTRAL RAILROAD COMPANY and HOUSTON & TEXAS CENTRAL RAILWAY COMPANY,

Appellees.

MEMORANDUM ON BEHALF OF THE APPELLEE, METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK.

TOMPKINS MCILVAINE,
Solicitor and Counsel for Appellee,
Metropolitan Trust Company of
the City of New York.

New York:
Stillman Appellate Printing Co.
1911.

Supreme Court of the United States,

OCTOBER TERM, 1910.

No. 777.

WALTER B. LAWRENCE, suing on behalf of himself and other Stockholders of the Houston and Texas Central Railway Company, similarly situated who may come in and contribute to the expenses of this action,

Appellant,

against

SOUTHERN PACIFIC COMPANY, Frederic P. Olcott, Central Trust Company of New York, Farmers' Loan & Trust Company, Metropolitan Trust Company of the City of New York, the Houston & Texas Central Railroad Company and Houston & Texas Central Railway Company,

Appellees.

To the Honorable Justices of the Supreme Court of the United States:

The Metropolitan Trust Company of the City of New York, one of the appellees herein, by Tomp-

kins McIlvaine, its solicitor and counsel, joins in the memorandum submitted on the motion herein on behalf of the appellees, The Southern Pacific Company, the Houston & Texas Central Railroad Company and Central Trust Company of New York, and respectfully requests this Court that if the hearing in the above entitled action be advanced as requested by the appellant, counsel to said Metropolitan Trust Company may be permitted to make oral argument on the merits of the appeal heretofore taken herein by the said appellant, at such date as may be convenient to this Court.

Solicitor & Counsel for Appellee,
Metropolitan Trust Company
of the City of New York.

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Supreme Court of the United States.

OCTOBER TERM, 1910.

NO. [redacted] 165.

WALTER B. LAWRENCE, suing on behalf of himself and other stockholders of the Houston and Texas Central Railway Company, similarly situated, who may come in and contribute to the expenses of the action,

Appellant,

vs.

THE SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL TRUST COMPANY OF NEW YORK, FARMERS' LOAN AND TRUST COMPANY, METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, THE HOUSTON AND TEXAS CENTRAL RAILROAD COMPANY and HOUSTON AND TEXAS RAILWAY COMPANY,

Appellees.

Memorandum on Behalf of Appellees The Southern Pacific Company, The Houston and Texas Central Railroad Company, and Central Trust Company of New York, on Motion to Advance.

ARTHUR H. VAN BRUNT,
Counsel for Appellees, The Southern Pacific Company, The Houston and Texas Central Railroad Company and Central Trust Company of New York.

C. G. BURGOYNE, 72 to 76 Spring Street, New York.

Supreme Court of the United States,

OCTOBER TERM, 1910.

No. 777.

WALTER B. LAWRENCE, suing on behalf of himself and other stockholders of the Houston and Texas Central Railway Company, similarly situated, who may come in and contribute to the expenses of the action,

Appellant,

vs.

THE SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL TRUST COMPANY OF NEW YORK, FARMERS' LOAN AND TRUST COMPANY, METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, THE HOUSTON AND TEXAS CENTRAL RAILROAD COMPANY and HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY,

Appelees.

Memorandum on Behalf of Appellees The Southern Pacific Company, The Houston and Texas Central Railroad Company and Central Trust Company of New York, on Motion to Advance.

The present case is brought to this Court, on appeal from the Circuit Court of the United States for the Eastern District of New York under section 5 of the

act of March 3, 1891 (chap. 517), upon the ground that the only question in issue is the question of the jurisdiction of the Court below.

This motion is to advance the case under the provisions of Rule 32 of this Court.

The only point that these defendants desire to urge on this motion is that, by reason of the nature of the questions involved upon the present appeal, the case should be set down for oral argument.

The action was originally instituted by the complainant Lawrence, suing as a stockholder of the Houston and Texas Central Railway Company, in the right of that corporation, in the Supreme Court of the State of New York for the County of Queens. The complaint asked for an accounting and for other relief, and alleged a demand upon the Railway Company to bring the action and a refusal on its part so to do. The Houston and Texas Central Railway Company was named as a party defendant in the action, but has never been served with process and has not appeared.

After process had been served upon all the defendants other than the Railway Company, the action was removed to the Circuit Court of the United States for the Eastern District of New York upon the ground of diversity of citizenship. Two motions to remand the case to the state court were made by the complainant, both of which were denied by the circuit court.

The defendants named in the complaint, other than the defendant Olcott, who had died in the meantime, and the Houston and Texas Central Railway Company, which had never been served with process, thereupon filed pleas in bar to the bill of complaint setting up that the Railway Company was an indispensable party to the action, that it had not been and could not be subjected to the jurisdiction of the court by reason of the fact that it was a foreign corporation not carrying on any business within the State of New York, and that the action could not proceed in its absence. Issue was joined upon the pleas, and the case heard upon an agreed statement of facts, appearing at pages 66 to 70 of the record.

The circuit court sustained the pleas and dismissed the bill, denying the complainant's motion to remand the case to the state court (*opinion of* CHATFIELD, J., *Record*, p. 70; 180 Fed., 822).

The question thus presented for decision to the circuit court was this: Where an action is instituted in the state court against several defendants, one of whom is an indispensable party defendant but who has not been served with process, and the action is removed to the United States Circuit Court, all the necessary elements of federal jurisdiction being present in the diversity of citizenship of the indispensable parties, jurisdiction over the persons of the defendants who are before the court and over the subject matter of the action, should the action be dismissed by reason of the absence of the indispensable party, or should it be remanded to the state court?

On the one hand we have the provision of section 3 of the removal act (Act March 3, 1887, c. 373, 24 Stat., 555, and Act Aug. 13, 1888, c. 866, 25 Stat., 436; U. S. Comp. Stat., 1901, p. 510), that, upon the removal of a case to the circuit court, "the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court," and the similar provision of section 6 that, in all cases removed under the provisions of the act, the circuit court shall "proceed therein as if the suit had been originally commenced in said circuit court;" and, on the other hand, the provision of section 5 "that if, in any suit * * * removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been * * * removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, * * * the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require * * *."

The claim was made on behalf of complainant in the court below that, under the last clause of section 5 of

the act quoted above, the case should have been remanded to the state court, because the federal court could not proceed to a determination of the case upon the merits by reason of the absence of an indispensable party over whom it was impossible, under the established rules of federal procedure, to obtain jurisdiction, and that, therefore, "justice required" the remand to the state court, where jurisdiction could be obtained by publication.

We believe that the court below was right in holding that the statute should not be construed in this sense, and that the word "justice" must be interpreted to mean, not "the possibility of bringing the various defendants into court," but "a hearing and disposition of the case by a court having jurisdiction of a controversy between citizens of different states, and also jurisdiction over all the parties before it, with a determination that no judgment against any defendant can be entered, because an indispensable defendant has not and cannot be made party to the suit" (*Record*, p. 78).

Any other construction would nullify the language of sections 3 and 6 of the act to the effect that upon removal to the circuit court the case shall proceed as if originally commenced therein. As stated by the court below, however, this question has never been decided except in the case at bar (*Record*, p. 78), and it is submitted that the appeal should be set down for oral argument, in order that the point involved may be fully presented to the Court.

Respectfully submitted,

ARTHUR H. VAN BRUNT,

Counsel for Appellees The Southern Pacific Company, The Houston and Texas Central Railroad Company and Central Trust Company of New York.

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Supreme Court of the United States,

OCTOBER TERM, 1912.

No. 165.

HENRY L. BOGART, TOWNSEND LAWRENCE and ANITA LAWRENCE, as Executors of Walter B. Lawrence, suing on behalf of themselves and other stockholders of the Houston and Texas Central Railway Company, similarly situated, who may come in and contribute to the expenses of the action,

Appellants,

vs.

THE SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL TRUST COMPANY OF NEW YORK, FARMERS' LOAN AND TRUST COMPANY, METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, THE HOUSTON AND TEXAS CENTRAL RAILROAD COMPANY and HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY,

Appellees.

Brief on behalf of appellees, The Southern Pacific Company, The Houston and Texas Central Railroad Company and Central Trust Company of New York.

Statement.

This is an appeal from a decree of the Circuit Court of the United States for the Eastern District

of New York entered September 23, 1910 (*Record*, p. 80).

The appeal is taken directly to this Court from the decree of the Circuit Court upon the ground that the jurisdiction of the Circuit Court is in issue under Section 5 of the Court of Appeals Act of March 3, 1891 (c. 517, 26 Stat. 826; 1 U. S. Comp. Stat. (1901) 549).

The case involves the reorganization of the Houston and Texas Central Railway Company, litigation in respect of which has been pending in the Federal courts in Texas and in the courts of the State of New York for the last twenty-three years:

> *Carey* v. *H. & T. C. Ry. Co.*, 45 Fed. 438 (1891); 52 Fed. 671 (1892); C. C. E. D. Texas; stockholders held not entitled to have foreclosure set aside as fraudulent or to decree enjoining carrying out of plan of reorganization.
>
> *Carey* v. *H. & T. C. Ry. Co.*, 150 U. S. 170 (1893); appeal to Supreme Court from decree of Circuit Court dismissed.
>
> *Carey* v. *H. & T. C. Ry. Co.*, 9 C. C. A. 687; 13 U. S. App. 729 (1894); decree of Circuit Court affirmed by Circuit Court of Appeals for the Fifth Circuit.
>
> *Carey* v. *H. & T. C. Ry. Co.*, 161 U. S. 115 (1896); appeal to Supreme Court from decree of Circuit Court of Appeals dismissed.
>
> *Gernsheim* v. *Olcott*, 10 N. Y. Supp. 438 (1890); *Gernsheim* v. *Central Trust Co.*, 16 N. Y. Supp. 127 (1891); stockholders held not entitled to reduction of assessment or to injunction against distribution of stock of new company under reorganization.
>
> *MacArdle* v. *Olcott*, 189 N. Y. 368 (1907); action by stockholders to set aside foreclosure sale and annul reorganization agreement on ground of fraud dismissed.

The present action was originally instituted by the appellants' testator (the complainant below) in the Supreme Court of the State of New York for the County of Queens. Complainant sued as a stock holder of the Houston and Texas Central Railway Company and in the right of that corporation, on behalf of himself and of all other stockholders similarly situated, alleging a demand upon the corporation to bring the action and a refusal on its part so to do (*Record*, p. 11). The Houston and Texas Central Railway Company, in the right of which this action was brought, is a corporation organized under the laws of the State of Texas (*Record*, p. 66). It was named as a party defendant to the action, but has never been served with process and has not appeared.

After process had been served upon all of the defendants other than the Railway Company, the action was removed to the Circuit Court of the United States for the Eastern District of New York upon the ground of diversity of citizenship. Two motions to remand the case were made by the complainant, both of which were denied by the Circuit Court (*Record*, pp. 40, 56).

The defendants named in the complaint other than the defendant Olcott, who had died in the meantime, and against whose executors the action has never been revived, and the Houston and Texas Central Railway Company, which had never been served with process or appeared, thereupon filed pleas in bar to the bill of complaint, setting up that the Railway Company was an indispensable party to the action, that it had not been and could not be subjected to the jurisdiction of the court by reason of the fact that it was a foreign corporation not carrying on any business in the State of New York where the action was brought, and that the action could not proceed in its absence (*Record*, pp. 42–48).

Issue was joined upon the pleas and the case

heard upon an agreed statement of facts (*Record*, pp. 66-70).

The Circuit Court sustained the pleas and dismissed the bill, denying the complainant's motion to remand (*Record*, pp. 80, 81).

Lawrence v. *Southern Pacific Co.*, 180 Fed. 822.

The following are the questions certified by the Circuit Court (*Record*, pp. 81, 82):

1. Whether the Circuit Court had jurisdiction to proceed with the cause, and whether the Circuit Court had jurisdiction of the cause of action.

2. Whether the Houston and Texas Central Railway Company was an indispensable party to the action.

3. Whether if the Houston and Texas Central Railway Company was an indispensable party to the action and would not appear therein and could not be served with process within the jurisdiction of the Court, the Court thereby lost jurisdiction of the cause of action so that it should dismiss the bill.

4. Whether if the Houston and Texas Central Railway Company was an indispensable party and would not appear and could not be served with process within the jurisdiction of the Circuit Court, the cause should have been remanded to the State Court, from whence it was removed.

POINTS.

I.

In appeals or writs of error from the District or Circuit Courts direct to this Court under Section 5 of the Act of March 3, 1891, in cases in which the jurisdiction of the court below is in issue, the only question which can properly be certified to this Court is that of the jurisdiction of the court below *as a Federal Court.*

(1)

The question of jurisdiction alone can be certified.

Section 5 of the Act of March 3, 1891, c. 517 (26 Stat. 826; 1 U. S. Comp. Stat. (1901) 549), provides as follows:

> "SEC. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:
>
> In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.
>
> From the final sentences and decrees in prize causes.
>
> In cases of conviction of a capital crime.
>
> In any case that involves the construction or application of the Constitution of the United States.
>
> In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.
>
> In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

> Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for review of such cases."

The only part of this section involved in the present case is the first clause, relating to cases in which the jurisdiction of the court is in issue. In such cases the statute expressly provides that "*the question of jurisdiction alone* shall be certified to the Supreme Court from the court below for decision."

(2)

This Court will consider only the question of jurisdiction.

This Court has repeatedly held that in appeals direct from the District and Circuit Courts, under the provision of the statute involved in the present case, only the question of jurisdiction can be considered.

Schunk v. *Moline, &c., Co.*, 147 U. S. 500, 503.
Passavant v. *United States*, 148 U. S. 214, 217.
Greeley v. *Lowe*, 155 U. S. 58, 76.
Mexican Central Ry. Co. v. *Eckman*, 187 U. S. 429, 432.
O'Neal v. *United States*, 190 U. S. 36.
Venner v. *Great Northern Ry Co.*, 209 U. S. 24, 30, 31.
Scully v. *Bird*, 209 U. S. 481, 485.

(3)

The question of jurisdiction referred to in the act of 1891 is that of the jurisdiction of the District and Circuit Courts *as Federal Courts* and not of their general jurisdiction as judicial tribunals.

This proposition is established by a long line of decisions.

Smith v. *McKay*, 161 U. S. 355.
Bl[illegible] v. *Hinckley*, 173 U. S. 501.

Illinois Central R. R. Co. v. *Adams*, 180 U. S. 28, 34.
Mexican Central Ry. Co. v. *Eckman*, 187 U. S. 429.
Louisville Trust Co. v. *Knott*, 191 U. S. 225.
Bache v. *Hunt*, 193 U. S. 523.
Courtney v. *Pradt*, 196 U. S. 89.
Board of Trade v. *Hammond Elevator Co.*, 198 U. S. 424.
United States v. *Larkin*, 208 U. S. 333.
Bien v. *Robinson*, 208 U. S. 423.
Scully v. *Bird*, 209 U. S. 481.
The Steamship Jefferson, 215 U. S. 131.
Davis v. Cleveland, &c., Ry. Co., 217 U. S. 157.
Fore River Shipbuilding Co. v. *Hagg*, 219 U. S. 175.
Darnell v. *Illinois Central R. R. Co.*, 225 U. S. 243.

Thus an appeal will lie to this Court under the act of March 3, 1891, where the question to be determined is:—

(*a*) whether the requisite diversity of citizenship exists;
Mexican Central Ry. Co. v. *Eckman*, 187 U. S. 429,
Venner v. *Great Northern Ry. Co.* 209 U. S. 24.

(*b*) or has been collusively obtained;
Chicago v. *Miller*, 204 U. S. 321.

(*c*) whether the amount in controversy exceeds $2,000;
Building & Loan Association v. *Price*, 169 U. S. 45.
Wetmore v. *Rymer*, 169 U. S. 115.
Smithers v. *Smith*, 204 U. S. 632.

(*d*) or whether the subject-matter of the action is within the jurisdiction of the Federal court;

Giles v. *Harris*, 189 U. S. 475.
Venner v. *Great Northern Ry. Co.*, 209 U. S. 24.

(*e*) whether the suit is brought in the proper Federal district;

Davidson Bros. Marble Co. v. *United States ex rel. Gibson*, 213 U. S. 10.
United States v. *Congress Construction Co.*, 222 U. S. 199.

(*f*) whether the court ever acquired jurisdiction by the valid service of process;

Shepard v. *Adams*, 168 U. S. 618.
Remington v. *Central Pacific R. R. Co.*, 198 U. S. 95.
Board of Trade v. *Hammond Elevator Co.*, 198 U. S. 424.
Kendall v. *American Automatic Loom Co.*, 198 U. S. 477.
Mechanical Appliance Co. v. *Castleman*, 215 U. S. 437.
Davis v. *Cleveland, &c., Ry. Co.*, 217 U. S. 157.
Herndon-Carter Co. v. *Norris & Co.*, 224 U. S. 496.
Chase v. *Wetzlar*, 225 U. S. 79.

(*g*) or by proper proceedings upon removal from the state court.

Powers v. *Chesapeake & Ohio Ry. Co.*, 169 U. S. 92.

But where the necessary elements of Federal jurisdiction exist, the jurisdiction of the court attaches, and an exercise of that jurisdiction, as by a dismissal of the bill, does not involve any question of

Federal jurisdiction which can be reviewed by this Court under the Act of March 3, 1891.

Smith v. *McKay*, 161 U. S. 355.
Blythe v. *Hinckley*, 173 U. S. 501.
Illinois Central R. R. Co. v. *Adams*, 180 U. S. 28, 34.
Denver First National Bank v. *Klug*, 186 U. S. 202.
Louisville Trust Co. v. *Knott*, 191 U. S. 225.
Bache v. *Hunt*, 193 U. S. 523.
Schweer v. *Brown*, 195 U. S. 171.
Courtney v. *Pradt*, 196 U. S. 89.
Lucius v. *Cawthon-Coleman Co.*, 196 U. S. 149.
United States v. *Larkin*, 208 U. S. 333.
Bien v. *Robinson*, 208 U. S. 423.
Scully v. *Bird*, 209 U. S. 481, 485.
Kansas City, &c., R. R. Co. v. *Zimmerman*, 210 U. S. 336.
Fore River Shipbuilding Co. v. *Hagg*, 219 U. S. 175.
United States v. *Congress Construction Co.*, 222 U. S. 199, 201.

II.

The certificate of the Circuit Court in the present case improperly certifies to this Court for decision questions other than that of jurisdiction, and does not certify the question of the jurisdiction of the Circuit Court as a Federal Court.

(1)

Questions other than that of jurisdiction are improperly included in the certificate of the Circuit Court.

In the present case the certificate of the Circuit Court certifies to this Court questions other than that of jurisdiction (*Record*, pp. 81, 82).

The attempt to bring these questions before this Court is obviously improper in view of the provision of Section 5 of the Act of 1891, above quoted, that the question of jurisdiction alone shall be certified.

The power to certify other than jurisdictional questions is vested only in the Circuit Courts of Appeal.

Arkansas v. *Schlierholz*, 179 U. S. 598, 601.

(2)

The question of the jurisdiction of the Circuit Court *as a Federal Court* is not certified.

The question certified in the first paragraph of the certificate of the Circuit Court (*Record*, p. 82), is simply "whether the Circuit Court had jurisdiction to proceed with the cause, and whether the Circuit Court had jurisdiction of the cause of action."

It nowhere appears that the question before the Court below was as to its jurisdiction *as a Federal Court*, and that question is not certified.

III.

This Court is not concluded by the certificate of the court below, but will dismiss the appeal if it appears that the question of the jurisdiction of the court below *as a Federal Court* is not in issue.

The right of review on a direct proceeding concerning the jurisdiction of the court below depends upon the record and not upon the mere statement of facts made in the certificate prepared by the trial court.

Nichols Lumber Co. v. *Franson*, 203 U. S. 278.

Accordingly the appeal will be dismissed where the question of the jurisdiction of the court below as a Federal court is not presented, in spite of the certificate of the court below to the contrary.

Darnell v. *Illinois Central R. R. Co.*, 225 U. S. 243.

The result of any other decision would be that this Court is bound by the certificate of the court below and would be obliged to consider any question that might be certified to it for decision, however improperly.

IV.

The jurisdiction of the Circuit Court *as a Federal Court* is not in issue in the present case.

(1)

Elements of Federal Jurisdiction.

> "Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence. It exists in the Circuit Courts of the United States under the express terms of the Act of August 13, 1888, if the plaintiff be a citizen of one state, the defendant a citizen of another, if the amount in controversy exceed $2,000, and the defendant be properly served with process within the District. Excepting certain *quasi*-jurisdictional facts, necessary to be averred in particular cases, and immaterial here, these are the only facts required to vest jurisdiction of the controversy in the Circuit Courts."

Per BROWN, *J.*, in

Illinois Central R. R. Co. v. *Adams*, 180 U. S. 28, 34.

See also

Ex parte Moore, 209 U. S. 490, 506.

Ex parte Gruetter, 217 U. S. 586.

(2)

There is no question but that the necessary elements of Federal jurisdiction exist in the present case.

(*a*) *Diversity of Citizenship.*

The complainant is a citizen and resident of the State of New York; the defendant Southern Pacific Company, a corporation of the State of Kentucky and a citizen and resident of said State; the defend-

ant Frederic P. Olcott, a citizen and resident of the State of New Jersey; and the defendants The Houston and Texas Central Railroad Company and Houston and Texas Central Railway Company, corporations of the State of Texas and citizens and residents of said State. The three defendant trust companies are corporations of the State of New York, but it was alleged in the petition for removal and not denied by the complainant that none of said three defendant trust companies were necessary or indispensable parties to the action and that no controversy existed between them and the complainant (*Record*, pp. 30, 31). The citizenship of the three defendant trust companies may therefore be disregarded under the rule that "in a determination of the jurisdiction of the national courts and the right to remove causes to them, indispensable parties only should be considered, because all others may be dismissed or disregarded, if their presence would oust or restrict the jurisdiction or the right."

Rogers v. *Penobscot Mining Co.*, 154 Fed. 606.

Barney v. *Latham*, 103 U. S. 205.

Thayer v. *Life Association*, 112 U. S. 717.

Wilson v. *Oswego Township*, 151 U. S. 56.

The Court below held that the action was properly removable (*Record*, p. 39) and the complainant does not here dispute that decision.

That the defendant trust companies are not indispensable parties to the action is apparent from an examination of the complaint. In so far as the complaint seeks to have the defendant Southern Pacific Company declared to be trustee of the $10,000,000 capital stock of The Houston and Texas Central Railroad Company in favor of the plaintiff and of other minority stockholders of the old Railway Company, it is clear that it does not require the joinder

of the defendant trust companies as parties defendant. If they are necessary parties at all, it is only in so far as the action has to do with the lands covered by the trust indentures referred to in Paragraphs Thirtieth, Thirty-First and Thirty-Second of the complaint (*Record*, pp. 10, 11). The bill does not seek to question or disturb the lien of the trust companies under any of the trust indentures, and the prayer of the bill simply is that the lands be conveyed to the old Railway Company after the fulfillment and completion of the purposes of the trust indentures (*Record*, pp. 12, 13). It is clear from the face of the bill that no beneficial interest in the lands can be asserted by any of the defendant trust companies, since by their terms the lands are to be sold for the benefit of the holders of the new bonds under the three new mortgages of the reorganized Railroad Company, no provision being made for the disposition of the surplus, if any, after the satisfaction of all of the bonds and the discharge of the three mortgages, "but the said lands, after a sufficient amount thereof shall have been sold to satisfy and discharge the bonds issued under the said three new mortgages, *are to revert to* the said Frederic P. Olcott and his heirs" (*Record*, p. 8). Paragraphs Thirtieth, Thirty-First and Thirty-Second of the complaint allege that "said provision as to the reversion to the defendant Olcott of the remaining surplus of said lands is in violation of the terms of said Reorganization Agreement and the said reorganized Railroad Company is and should be the beneficiary only of the surplus of said lands *after the payment and satisfaction of the said mortgage bonds*" (*Record*, pp. 10, 11).

It is clear from the foregoing that the bill of complaint does not disclose any interest in the defendant trust companies which requires them to be made parties to the suit, the only relief sought in respect of the lands in question being to charge the said lands with a trust in favor of the old Houston and Texas Central Railway Company and its minority stockholders after the purposes of the three

trust indentures have been fulfilled. It cannot even be urged that a conveyance from any of the trust companies is necessary because, as alleged in the complaint, the said lands, after a sufficient amount thereof shall have been sold to retire the bonds issued by the reorganized Railroad Company "*are to revert to*" the defendant Olcott and his heirs (*Record*, p. 8). The case is therefore similar to the ordinary action by a junior encumbrancer to establish a lien or claim asserted by him. In such case it is well settled that "no person whose claims under a title paramount or prior to that sought to be enforced by the bill and whose interests and title are not affected by the relief prayed for need be a party to the bill."

Frye v. *Bank of Illinois*, 11 Ill. 367, 372.

Jerome v. *McCarter*, 94 U. S. 734.

The rule is stated by Justice Story (Eq. Pl., 10th Ed., Secs. 230, 231) as follows:

> "In the next place, no person need be made a party to a bill who claims under a title paramount to that prayed for and to be enforced in the suit; or who claims under a prior title or encumbrance not affected by the interests or relief sought in the bill. Thus, for example, on a bill to carry into effect the trusts of a will, a person who claims by a title paramount to that will ought not to be made a party in order to bring into contestation his rights under such paramount title. So, where a bill seeks merely the application of the surplus of a trust fund after discharging prior encumbrances, the prior encumbrancers are not necessary parties.
>
> "In the next place, no person should be made a party who has no interest in the suit and against whom, if brought to a hearing, no decree can be had."

See also

Williams v. *United States*, 138 U. S. 516.

Lake St. L. El. R. Co. v. *Ziegler*, 99 Fed. 114, 120.

Under these authorities it is clear that the defendants Central Trust Company of New York, Farmers' Loan and Trust Company and Metropolitan Trust Company of the City of New York are not indispensable parties to the action, and were therefore rightly disregarded in considering whether the case was properly removed to the Circuit Court.

(*b*) *Subject matter and jurisdictional amount.*

The subject matter of the action is the alleged right of the complainant, suing in the right of the Houston and Texas Central Railway Company, to an accounting from The Southern Pacific Company and The Houston and Texas Central Railroad Company. There can be no claim that such a controversy is not properly justiciable in the Federal court.

The amount in controversy is concededly in excess of $2,000 (*Petition for removal, paragraph* 4; *Record*, 31).

(*c*) *Service of Process upon Defendants.*

All of the defendants except the Houston and Texas Central Railway Company have either been served with process or have voluntarily appeared.

The Houston and Texas Central Railway Company has neither been served with process nor has it appeared in the action, and hence cannot properly be considered as a party.

> *Cole Silver Mining Co.* v. *Virginia & Gold Hill Water Co.*, 1 Sawy. 470; Fed. Cas. No. 2989.

There is therefore no question as to the proper service or any of the defendants within the district.

(3)

There is no question but that the case was properly removed from the State Court.

Whether the District or Circuit Court has acquired jurisdiction of the parties by proper proceedings

upon removal from the state court is a question involving the jurisdiction of the court as a Federal court, from which an appeal will lie direct to this Court under the act of March 3, 1891.

Powers v. *Chesapeake & Ohio Ry. Co.* 169 U. S. 92.

In such cases, however, in order to permit a review by this Court under the Act of 1891, the motion to remand must in terms put in issue the power of the lower court as a court of the United States to hear and determine the case.

Courtney v. *Pradt*, 196 U. S. 89, 92.

No such question is presented here. The appellants' assignment of errors does not set up that the case was improperly removed (*Record*, p. 83); no such claim is made in appellants' brief; and the certificate of the Circuit Court does not raise the question (*Record*, p. 82). The question whether the Circuit Court acquired jurisdiction of the parties or of the subject matter by proper proceedings upon the removal of the cause is therefore not raised by the record or by appellants' brief. The question raised by the fourth assignment of error (*Record*, p. 83) is not as to whether the Circuit Court acquired jurisdiction on removal but whether "the Court erred in denying the complainant's motion to remand the cause * * * *after holding* that it had no jurisdiction to proceed with the cause because the Houston and Texas Central Railway Company was an indispensable party to the action." As pointed out in the succeeding subdivision (4) of this point, the determination of the Circuit Court that it had no jurisdiction to proceed with the cause constituted *an exercise* of its jurisdiction as a judicial tribunal which in no way involved the question of its jurisdiction *as a Federal Court.*

(4)

The dismissal of the bill constituted an exercise of jurisdiction on the part of the Circuit Court.

It is too well settled to admit of controversy that where the necessary elements of Federal jurisdiction exist the action of the court in dismissing the bill constitutes an *exercise* of jurisdiction, which does not involve the jurisdiction of the court *as a Federal court*, and cannot therefore be reviewed under the Act of March 3, 1891. This has been repeatedly held by this Court, as shown by the following cases in which the appeal was dismissed, viz.:

(*a*) *Bill dismissed on demurrer on the ground that no cause of action was stated.*

Darnell v. *Illinois Central R. R. Co.*, 225 U. S. 243.

(*b*) *Bill dismissed for want of equity.*

Smith v. *McKay*, 161 U. S. 355.
Blythe v. *Hinckley*, 173 U. S. 501.
Louisville Trust Co. v. *Knott*, 191 U. S. 225.
Scully v. *Bird*, 209 U. S. 481.

(*c*) *Bill dismissed because defendant was a foreign executor.*

Courtney v. *Pradt*, 196 U. S. 89.

See also

Illinois Central R. R. Co. v. *Adams*, 180 U S. 28, 36.
Denver First National Bank v. *Klug*, 186 U. S. 202.
Bache v. *Hunt*, 193 U. S. 523.
Schweer v. *Brown*, 195 U. S. 171.
Lucius v. *Cawthon-Coleman Co.*, 196 U. S. 149.
Bien v. *Robinson*, 208 U. S. 423.
Kansas City, &c., R. R. Co. v. *Zimmerman*, 210 U. S. 336.

The situation in the present case is this: The complainant sues as a stockholder of the Houston and Texas Central Railway Company, setting forth an alleged cause of action in favor of that company which he seeks to enforce for its benefit, naming the company itself and the parties against whom relief is sought as defendants. Clearly in such a case the corporation for whose benefit the action is brought is an indispensable party.

Davenport v. *Dows*, 18 Wall. 626.
Dewing v. *Perdicaries*, 96 U. S. 193.
Central R. R. Co. of New Jersey v. *Mills*, 113 U. S. 249.
Swan Land & Cattle Co. v. *Frank*, 148 U. S. 603.
Venner v. *Great Northern Ry. Co.*, 209 U. S. 24, 32.

Pleas are filed by the appellees setting up that the corporation is an indispensable party to the action; that, because it is a foreign corporation not carrying on business within the district, it cannot be subjected to the jurisdiction of the court; that the action cannot proceed in its absence, and should therefore be dismissed. The court sustains the pleas and dismisses the bill "on the ground that the Court has not jurisdiction to proceed further with the cause, for the reason that the Houston and Texas Central Railway Company is an indispensable party to this cause, and cannot be brought in as a party by the complainant or served with process by the complainant and will not voluntarily appear" (*Record*, p. 81).

It would seem to be self evident from this statement that the jurisdiction of the Circuit Court as a Federal Court is not in issue. The only questions in issue are (1) whether the Houston and Texas Central Railway Company *is* an indispensable party to the action, and, if it be so, then (2) whether the Court has the power to proceed with the cause in the absence of such indispensable

party. Obviously these are questions simply of *equity practice* and do not in any way affect the jurisdiction of the Court as a Federal tribunal. In determining them the Court necessarily exercises jurisdiction, but that jurisdiction is its jurisdiction as a court of equity. The same questions would arise under similar circumstances in any state court and would likewise have to be determined there under the general rules of equity jurisprudence, without regard to the character of the forum in which the case was pending. This is apparent from the opinion of the Circuit Court in the present case (*Record*, p. 77). The Court said:

> "The corporation [the Houston and Texas Central Railway Company] in this particular action is an indispensable party, *and this court has entire jurisdiction to determine whether or not the suit can proceed with or without this party.*" (Italics ours.)

As stated by the Court below (*Record*, p. 29), the present action is between citizens of different States, and was properly removed, and the case could be determined as between the parties before the court if no one else were necessary to such determination. Hence, "*there is no defect of jurisdiction, but simply lack of parties*" (*Record*, p. 79). (Italics ours.)

The grounds upon which counsel for the appellants claim that the jurisdiction of the Circuit Court was in issue are stated at page 23 of their brief, where it is said:

> "The court below construed adversely to its jurisdiction a Federal statute passed manifestly for the purpose of extending the jurisdiction of the Federal courts. The court also assumed that there existed in the Federal court a jurisdiction to deny a motion to remand and dismiss a case which could be tried in the State court."

With regard to the first sentence of this quotation it is sufficient to observe that the dismissal of the

bill did not cease to be an exercise of jurisdiction because it involved the construction of a Federal statute. (We presume it is intended to refer to Section 737 of the Revised Statutes, quoted at page 12 of the brief of counsel for the appellants.) And all the elements of Federal jurisdiction being present, the 'adverse construction' of the statute related merely to the jurisdiction of the Circuit Court as a court of equity and not to its jurisdiction as a court of the United States.

The second sentence of the quotation above made from the brief of appellants' counsel states that "the Court also assumed that there existed in the Federal court a jurisdiction to deny a motion to remand, and dismiss a case which could be tried in the State court." Here again counsel fail to distinguish between the jurisdiction of the court as a general judicial tribunal, and as a court of the United States. As pointed out above, there is no question but that the elements of Federal jurisdiction exist, or that the case was properly removed. The denial of the motion to remand and the dismissal of the case because of the absence of an indispensable party does not therefore present any question of the jurisdiction of the Circuit Court *as a Federal Court*, which is subject to review on this appeal.

The present case cannot be distinguished from the decision of this Court in the case of

Courtney v. *Pradt*, 196 U. S. 89,

where this Court dismissed an appeal from a decision of the Circuit Court for the Eastern District of Kentucky dismissing a suit which had been removed from the State Court because the defendant was a foreign executor, who could not be served with process within the district.

Counsel for the appellants argue in their brief that the effect of the decision of the Circuit Court is to leave them without a remedy because any action

which they might bring in the state court would be subject to removal and dismissal, as was done here, while in the state court jurisdiction of the old Houston and Texas Central Railway Company could be obtained by publication (*Appellants' Brief*, pp. 17, 23). This argument overlooks the fact that jurisdiction over the Railway Company could not be obtained by publication under the state statute. While that statute provides for service of process by publication, such service would be unavailing here under the well recognized rule that in a personal action a judgment based upon service of process by publication upon a non-resident defendant is void.

Pennoyer v. *Neff*, 95 U. S. 714.
Haddock v. *Haddock*, 201 U. S. 562.

The appellants would therefore be no better off in the state court than in the Federal court.

V.

The appeal should be dismissed, with costs.

VI.

In case this Court should be of the opinion that the jurisdiction of the court below *as a Federal Court* was in issue, the decree appealed from should be affirmed for the reasons hereinafter stated.

VII.

The present suit is a representative action brought by the complainant on behalf of himself and all other stockholders of the Houston and Texas Central Railway Company similarly situated, in the right of the corporation.

(1)

It is apparent from an inspection of the complaint, that the pleader intended to frame the complaint as a representative action brought on behalf of the complainant Lawrence and all other minority stockholders of the Houston and Texas Central Railway Company, in the right of that company, for relief in respect to certain matters arising out of the reorganization.

The action is entitled to be at the suit of the complainant Lawrence, suing on behalf of himself and other stockholders of the Houston and Texas Central Railway Company similarly situated, who may come in and contribute to the expenses of the action; and it is alleged in article thirty-four of the complaint that the action "is brought on behalf of the plaintiff for his own benefit and of all other stockholders" of the Railway Company (*Record*, p. 12).

The thirty-third article of the complaint alleges a demand by the complainant and other stockholders similarly situated upon the directors of the old Railway Company to sue, and a refusal on their part to bring the action (*Record*, p. 11). The old Railway Company is named as a party defendant and the relief prayed for is that the stock and other property alleged to have been acquired by the Southern Pacific Company be, upon an accounting, distributed ratably among the shareholders of the old Railway Com-

pany, and that the reversion of the lands subject to the three trust indentures be transferred to the reorganized Railroad Company (*Record*, p. 12).

(2)

Apart from the form of the complaint, it is, however, obvious that the present suit is a representative action, brought in the right of the old Railway Company. The alleged injury which the complainant seeks to redress is not an injury to himself personally, but as a stockholder of the old Railway Company. The injury complained of is not peculiar to the complainant, but is one common to all the stockholders of the Railway Company.

The cases are clear to the effect that where the injury complained of is one which is common to all the stockholders of a corporation, the cause of action is in fact vested in the corporation, and an individual stockholder can sue only in equity in the right of the corporation joining it as a party defendant, after showing a proper demand upon the corporation and a refusal upon its part to sue.

DeNeufville v. *New York, &c., Ry. Co.*, 81 Fed. 10.

Redfield v. *Baltimore & Ohio R. R. Co.*, 124 Fed. 929.

Ames v. *American Tel. & Tel. Co.*, 166 Fed. 820.

Niles v. *New York Central, etc., R. R. Co.*, 176 N. Y. 119.

Loewenstein v. *Diamond Soda Water Mfg. Co.*, 94 App. Div. (N. Y.) 383

Michel v. *Betz*, 108 App. Div. (N. Y.) 241.

Knickerbocker v. *Conger*, 110 App. Div. (N. Y.) 125.

McCrea v. *McClenahan*, 114 App. Div. (N. Y.) 70.

Brown v. *Utopia Land Co.*, 118 App. Div. (N. Y.) 364.

Miller v. *Crown Perfumery Co.*, 125 App. Div. (N. Y.) 881.

Any relief obtained in the present suit would be for the benefit of the old Railway Company and not for the benefit of the plaintiff or of other stockholders individually or collectively. It may be that if upon an accounting a balance should be found due from the Southern Pacific Company the creditors of the Railway Company would be entitled to the fund before any part of it would be available for distribution among its stockholders. It is immaterial that the prayer for relief is that the proceeds found due upon an accounting from the Southern Pacific Company shall be distributed ratably among the stockholders of the Railway Company in proportion to the amount of stock held by them. Such a prayer was made in the case of *DeNeufville* v. *New York, &c., Ry. Co.*, 81 Fed. 10, above referred to, but the court held that this prayer should be disregarded and the suit treated as one for the benefit of the Railway Company.

See, also, the case of

Thompson v. *Stanley*, 20 N. Y. Supp. 317.

This was an action by Thompson as a stockholder of the Harris & Dew, &c., Co. against the defendant Stanley as administratrix, and the corporation, to recover the proceeds of property of the defendant corporation alleged to have been misappropriated by the intestate, the president of the corporation. The administratrix demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and that several causes of action had been improperly united. The court said:

> "The counsel for the plaintiff contended, upon the argument, and puts forward the same contention in his brief, that the complaint states but one cause of action, and that is to compel the defendant to account directly to the plaintiff and other stockholders for the proceeds of the property of the defendant corporation sold by her husband in his life-

time and appropriated to his own use. If I thought that this contention of counsel as to the nature of the cause of action attempted to be set up in the complaint were well founded, I should be of the opinion that the complaint did not state a good cause of action against the defendant Stanley, because, if there was such misappropriation by the husband, the injury was done to the corporation itself, and the corporation alone could maintain an action to recover such proceeds, and if an action were brought by the corporation upon such grounds and proved to be successful, any recovery had would be for the benefit of the corporation itself. Plaintiff's counsel seems to suppose, because the corporation has done no business for some years and now has no property except a claim against defendant Stanley for the proceeds of the corporation's property alleged to have been misappropriated by her husband, that the plaintiff can maintain an action on his own behalf and on behalf of other stockholders and may come in, and recover directly from the defendant his and their proportionate share of the funds alleged to have been misappropriated. As I understand the decisions, however, this cannot be done; for in such a case the right of action is vested in the corporation, and even where the corporation itself refuses to sue, and the action is brought by the stockholder, the recovery is not for the benefit of the plaintiff and all others who may join with him as plaintiffs, but for the benefit of the corporation itself. It does not follow, however, that the complaint does not state a good cause of action on behalf of the corporation, nor that the plaintiff is not entitled to prosecute the action.

* * * * *

"The fact, however, that the plaintiff has demanded relief that he is not entitled to does not render the complaint demurrable."

VIII.

The Houston and Texas Central Railway Company is an indispensable party to the action.

(1)

This proposition is involved in a number of the cases cited under the preceding point VII of this brief. It is clear that so long as the cause of action is one which properly belongs to the corporation itself, the corporation is an indispensable party, because its rights cannot be adjudicated in its absence, and any recovery in the action must be for the benefit of the corporation and not for the individual benefit of the plaintiff stockholder who brings the action.

See, in addition to the cases already cited:

Davenport v. *Dows*, 18 Wall. 626.
Dewing v. *Perdicaries*, 96 U. S. 193.
Central R. R. Co. of New Jersey v. *Mills*, 113 U. S. 249.
Swan Land & Cattle Co. v. *Frank*, 148 U. S. 603.
Venner v. *Great Northern Ry.*, 209 U. S. 24, 32.
Eldred v. *American Palace Car Co.*, 105 Fed. 457.
Morshead v. *Southern Pac. Co.*, 123 Fed. 350.
Kelly v. *Mississippi River Coaling Co.*, 175 Fed. 482.
Consolidated Water Co. v. *Babcock*, 76 Fed. 243.
Consolidated Water Co. v. *San Diego*, 93 Fed. 849.

In the leading case of *Davenport* v. *Dows* (*supra*), the Court said (p. 627):

> "That a stockholder may bring a suit when the corporation refuses is settled in

Dodge v. *Woolsey*, (18 How. 340), but such a suit can only be maintained on the ground that the rights of the corporation are involved. These rights the individual shareholder is allowed to assert in behalf of himself and associates, because the directors of the corporation declined to take the proper steps to assert them. Manifestly the proceedings for this purpose should be so conducted that any decree which shall be made on the merits shall conclude the corporation. This can only be done by making the corporation a party defendant. The relief asked is on behalf of the corporation, not the individual shareholder, and if it be granted the complainant derives only an incidental benefit from it. It would be wrong, in case the shareholder were unsuccessful, to allow the corporation to renew litigation in another suit, involving precisely the same subject matter. To avoid such a result, *a court of equity will not take cognizance of a bill brought to settle a question in which the corporation is the essential party in interest, unless it is made a party to the litigation.*' (Italics ours.)

In *Dewing* v. *Perdicaries* (*supra*), Mr. Justice SWAYNE said (96 U. S. p. 197):

"There are cases in which a corporation having refused to do its duty by suing to avert a threatened wrong, a stockholder was permitted to intervene in its stead, making the corporation a party. *Dodge* v. *Woolsey*, (18 How. 331), is one of this kind. Cases are more numerous where the directors having made themselves personally liable for neglect or breach of duty, and the corporation refusing to proceed against them, a stockholder has been permitted to sue in its behalf. In such cases, *the corporation is an indispensable party.* The refusal must be made distinctly to appear; and the avails of the litigation, if there be any, go the corporation, and are a part of its means, as if it had itself sued and recovered." (Italics ours.)

The case of *Central R.R. Co. of New Jersey* v. *Mills* (*supra*), was a bill filed in the Chancery Court of

New Jersey, by citizens of that State, stockholders of the Central Railroad of New Jersey, a New Jersey corporation, against that corporation and against a Pennsylvania corporation and several individuals, directors of both corporations, alleging that the New Jersey company, in pursuance of the acts of a majority of the stockholders, and in fraud of the rights of the plaintiffs, had made a lease of the Central Railroad's property to the Pennsylvania Company, and prayed that the lease might be set aside and the Pennsylvania Company ordered to account to the New Jersey Company for all profits received, and that the amount found due be ordered to be paid to the New Jersey Company; that the New Jersey Company take possession of the property covered by the lease, and distribute and pay over to the plaintiffs their share of all the moneys found to be due from the Pennsylvania Company to the New Jersey Company.

The case was removed to the United States Circuit Court and from there remanded to the state court. Upon appeal to the Supreme Court of the United States it was held that the Federal court had no jurisdiction, because as the defendant Central Railroad of New Jersey, a New Jersey corporation, which was named as a defendant, was an indispensable party, and that therefore the requisite diversity of citizenship did not exist. The Court said (113 U. S. 256):

> "The New Jersey corporation is in no sense a merely formal party to the suit, or a party in the same interest with the plaintiffs; but it is rightly and necessarily made a defendant."

This case was followed in that of *Venner* v. *Great Northern Ry. Co.* (*supra*), in which the Court held that in a stockholder's suit the corporation cannot be realigned as a party plaintiff in order to give the Federal court jurisdiction.

The case of *Swan Land & Cattle Co.* v. *Frank* (*supra*), was as follows: An agreement had been en-

tered into between the appellant, the Swan Land and Cattle Company, and three Wyoming corporations engaged in the business of raising and selling cattle, by the terms of which all the live stock, cattle and other property of the Wyoming corporations were to be transferred to the appellant, in consideration of certain payments to be made by it. The bill alleged that the consideration provided in the agreement had been paid by the appellant to the three Wyoming corporations, but that certain representations alleged to have been made by the latter in respect to the number of cattle on the ranches, were false and fraudulent, there being at least 30,000 less than represented, whereby appellant had suffered loss and damage in the sum of at least $800,000. It was further alleged that upon the receipt by the Wyoming corporations of the purchase price received from the appellant, they paid whatever liabilities they had outstanding, and distributed the remaining assets among their stockholders, and that since the time of such distribution no one of such three corporations had done any business or exercised any of their franchises. It was alleged that

> "the assets of said corporation were, in the hands of said corporations a trust fund, held by said corporations in trust to satisfy the claim of your orator herein set forth, before the shareholders of said corporations were entitled to receive any portion of the same, and said shareholders, in receiving said assets, did take and now hold the same as trustees in place of said corporations and subject to the lien of your orator's aforesaid claim, and should account for the same to your orator, and apply the same, so far as necessary, in satisfaction of your orator's claim herein set forth."

The three vendor corporations were not made parties to the bill. A demurrer to the bill was sustained on the ground that the three vendor corpora-

tions were necessary and indispensable parties to the suit. The court said (148 U. S. p. 610):

> "Now it is too clear to admit of discussion that the various corporations charged with the fraud which has resulted in damage to the complainant are necessary and indispensable parties to any suit to establish the alleged fraud and to determine the damages arising therefrom. Unless made parties to the proceeding in which these matters are to be passed upon and adjudicated, neither they nor their stockholders would be concluded by the decree. The defendants cannot be required to litigate those questions which primarily and directly involve issues with third parties not before the court. As any decree rendered against them would not bind either the corporations or their co-shareholders, it would manifestly violate all rules of equity pleading and practice to pursue and hold the defendants on an unliquidated demand for damages against companies not before the court. The complainant's right to follow the corporate funds in the hands of the defendants depends upon its having a valid claim for damages against the vendor corporations. That demand is not only legal in character, but can be settled and determined and the amount thereof ascertained, by some appropriate proceeding to which the corporations against which it is made are parties and have an opportunity to be heard. Stockholders cannot be required to represent their corporations in litigation involving such questions and issues. *The corporations themselves are indispensable parties to a bill which affects corporate rights or liabilities.*" (Italics ours.)

In the case of *Eldred* v. *American Palace Car Co.* (*supra*), a bill was filed by minority stockholders to set aside the transfer of property by the corporation, the latter not being made a party to the action. An order of the Circuit Court continuing a preliminary injunction against the defendants was reversed by the Circuit Court of Appeals for the Third Circuit, on the ground that the corporation was an indis-

pensable party and the injunction was dissolved and the case remanded with instructions to dismiss the bill. The Court said (105 Fed. p. 458):

> "It is quite clear that the right of action here sought to be enforced is the right of action of the Maine corporation. The right of such corporation is the foundation on which the relief sought by its stockholders rests. *The stockholder has no rights separable from those of the corporation.* The right of the party before the court depends on the right of the party not before the court. Not only is the presence on the record of that corporation necessary to constitute the stockholders' right, but the respondent has a right to its presence, so that it may be concluded by the decree. *The authorities are clear that such corporation, either as a complainant or a respondent, is an indispensable party to the bill.*" (Italics ours.)

The case of *Morshead* v. *Southern Pacific Co.* (*supra*) is a decision of JUDGE LACOMBE'S in the Southern District of New York, on a motion for a preliminary injunction to restrain the issue of certain stocks and bonds, in a suit brought by the plaintiffs as stockholders of the Central Pacific Railroad Company. The Court said (123 Fed. p. 351):

> "To such a suit the railroad company is an indispensable party. *Davenport* v. *Dows*, 18 Wall. 626. It has been named as a party defendant in the bill, but it has not been served, nor has it appeared. It is therefore not before this court upon this application, and in its absence the court will not examine into the merits of an application, which must be denied for defect of parties."

In addition to the New York decisions cited under the first point of this brief, we may also refer to another New York case in support of the proposition that in such a suit as the present the corporation is an indispensable party, namely

Harpending v. *Munson*, 91 N. Y. 650.

This was an action by a stockholder for relief in respect to an alleged fraudulent sale of the corporate property under foreclosure, the frame of the bill being very similar to that in the case at bar. The court said (p. 653):

> "But the most hopeful view of the case for the appellant is that which treats the action as brought to impress a trust upon the property in the hands of Munson [the purchaser] for the benefit of stockholders, upon the ground that as to them he was a wrong doer. Practically this means that he should be adjudged to hold the legal title which he had acquired for the benefit of the original company and its stockholders, because of his fraudulent conduct in procuring the default which culminated in the foreclosure. Practically this would be equivalent to setting aside the sale. * * * It is evident that the corporate mortgagor, representing the whole body of stockholders and not a single one of the latter, is the proper party to assail as voidable in equity, the legal title which has become vested in Munson."

(2)

The following cases are cited by counsel for the appellants in support of the proposition that the Houston and Texas Central Railway Company is not an indispensable party to the present action.

Kuchler v. *Greene*, 163 Fed. 91.

Irvin v. *Oregon R. R. & Navigation Co.*, 20 Fed. 577.

Crumlish v. *Shenandoah Valley R. R. Co.*, 28 W. Va. 623.

Fletcher v. *Newark Telephone Co.*, 55 N. J. Eq. 47.

Kidd v. *New Hampshire Traction Co.*, 72 N. H. 273.

None of these cases is in point.

In the case of *Kuchler* v. *Greene*, *supra*, the action was against individuals for on accounting of

profits as between stockholders, and the actual relief demanded was not the restoration of rights to the corporation itself, to be devoted to the purposes of the corporation for the benefit of the complainant, as in the present case (see *Record*, p. 73).

In the case of *Irvin* v. *Oregon R. R. & Navigation Co.*, *supra*, resolutions had been adopted by the stockholders and directors declaring the corporation dissolved and the court held that this constituted a dissolution of the corporation under the Oregon statute authorizing a dissolution upon the majority vote of stockholders, and that the presence of the corporation before the Court was, therefore, unnecessary (20 Fed. p. 581). Similarly in the case of *Crumlish* v. *Shenandoah Valley R. R. Co.*, *supra*, the action was brought by the plaintiffs as stockholders of the Central Railroad Company, a Pennsylvania corporation which had been actually dissolved and whose charter had been declared forfeited under the laws of the State of Pennsylvania (28 W. Va. p. 635). The Court therefore held that it was not a necessary party.

The New Jersey case of *Fletcher* v. *Newark Telephone Company* is not in point because the right there asserted was an individual right of the stockholder and not a derivative right based upon that of the corporation.

In *Kidd* v. *Traction Co.*, *supra*, the Court held that where jurisdiction of the property of the corporation could be obtained the Court could proceed with the action although jurisdiction of the corporation *in personam* had not been acquired.

IX.

The rule requiring the presence of the Houston and Texas Central Railway Company before the Court is not affected (1) by the provisions of Section 737 of the Revised Statutes or by Equity Rule 47; or (2) by the fact that it is a foreign corporation which cannot be served with process and which refuses to appear; or (3) that its property has been sold under foreclosure and that it is not now engaged in the transaction of any business.

(1)

Section 737 of the United States Revised Statutes (Act Feb. 28, 1839, c. 36, Sec. 1; 5 Stat. 321; 1 U. S. Comp. Stat. (1901) 587) provides:

> "When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."

Equity Rule 47 provides:

> "In all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the

> suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in their discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."

But the provisions quoted do not affect the rule that *indispensable* parties must be brought before the court.

> *Shields* v. *Barrow*, 17 How. 130, 141.
> *Gregory* v. *Stetson*, 133 U. S. 579, 586.
> *Swan Land & Cattle Co.* v. *Frank*, 148 U. S. 603, 611.
> *Greeley* v. *Lowe*, 155 U. S. 58, 70.

In the case of *Gregory* v. *Stetson* (*supra*), the court said (pp. 586, 587):

> "The point was made in the court below, and it is also pressed here, that Mrs. Pike being a non-resident and beyond the jurisdiction of the court, it was impossible to join her as a party defendant to this suit, and that it was, therefore, unnecessary to attempt to do so. The court below ruled against the complainant on this point, and we see no error in that ruling. The general question involved therein has been before this court a number of times, and it is now well settled that notwithstanding the statute referred to [R. S., Sec. 737] and the 47th Equity Rule, a Circuit Court can make no decree in a suit in the absence of a party whose rights must necessarily be affected thereby."

In *Swan Land & Cattle Co.* v. *Frank* (*supra*), the Court said (p. 611):

> "The general rule that suits in equity cannot be entertained and decrees be rendered, when necessary or indispensable parties,

> whether corporations or individuals, are not brought before the court, is not affected by section 1 of the act of February 28, 1839, c. 36, re-enacted in section 737 of the Revised Statutes of the United States, as this court has repeatedly held. *Shields* v. *Barrow*, 17 How. 130, 141; *Coiron et al.* v. *Millaudon*, 19 How. 113, 115; *Ogilvie* v. *Knox Ins. Co.*, 22 How. 380; *Barney* v. *Baltimore*, 6 Wall. 280; *Davenport* v. *Dows*, 18 Wall, 626."

See also

> *South Penn Oil Co.* v. *Miller*, 175 Fed. 729, 736, 737.

As appears from the cases cited under point VIII of this brief, it is too well settled to admit of controversy that the corporation is an indispensable party to a stockholders' bill.

(2)

In the case of *Swan Land & Cattle Co.* v. *Frank*, 148 U. S. 603, already above referred to, the court said (p. 612):

> "It does not help the matter that complainant could not get the vendor corporations before the Circuit Court for the Northern District of Illinois. That fact in no way affects the question of their being necessary parties, without whose presence no decree could be rendered against the appellees."

(3)

It is well settled that the insolvency of a corporation and the sale or distribution of its assets among its creditors and stockholders does not occasion a dissolution of the company.

> *Moseby* v. *Burrow*, 52 Tex. 396.
>
> *United States, &c., Trust Co.* v. *Delaware, &c., Construction Co.*, 112 S. W. 447 (Tex.).
>
> *Swan Land & Cattle Co.* v. *Frank*, 148 U. S. 603.

Nor is a corporation dissolved by the foreclosure of a mortgage upon its property.

Williard v. *Spartanburg, &c., R. R. Co.* 124 Fed. 796.

Atlas Railway Supply Co. v. *Lake & River Ry. Co.*, 134 Fed. 503.

City Water Co. v. *State*, 88 Tex. 600, 602.

In the case of *Moseby* v. *Burrow* (*supra*), the Court said (p. 403):

> "It is said by Chancellor KENT that 'the old and well established principle of law remains good as a general rule, that a corporation is not to be deemed dissolved, by reason of any misuser or nonuser of its franchises, until the default has been judicially ascertained and declared.' The mere insolvency of a corporation, or the appointment of a receiver for the same, would not necessarily dissolve the corporation. The answer of Moseby, to which exceptions were taken, averred that the Gayoso Savings Institution had suspended business, and ceased to operate its corporate franchises, and contained in general terms a conclusion of law and fact, that it had ceased to have a corporate existence. We are of opinion that these allegations were not sufficient to show a legal dissolution of the corporation."

In the case of *United States, &c., Trust Co.* v. *Delaware, &c., Construction Co.* (*supra*), the Court said (p. 458):

> "The appointment of a receiver [in an action to foreclose a mortgage] does not dissolve the corporation, nor hinder the exercise of corporate functions except those which involve the control and management of the property over which the court assumes to exercise supervision through the receiver."

In *City Water Co.* v. *State* (*supra*), decided by the Texas Supreme Court in 1895, the Court said (p. 603):

> "When the property of a corporation is placed in the hands of a receiver the corpora-

> tion is not dissolved thereby, nor is its existence in any way affected. It may be sued for claims existing against it before the receivership, * * * and judgment may be rendered against it and enforced against any property which it may have, not embraced in the receivership, or that it may thereafter acquire. *Heath* v. *Railway*, 83 Mo. 621; *Railway* v. *Whitaker*, 68 Texas, 636.
>
> "The franchise or right to be a corporate body is a right vested in the stockholders of the corporation, and not in the corporation itself, and the property or rights of the stockholders are not affected by the receivership or by any action of the court with reference thereto. Where a corporation is placed in the hands of a receiver and is not dissolved, although it may be insolvent in fact, after the property has been sold to another person such corporation may reacquire the property (which formerly belonged to it) by purchase from the person who bought it from the receiver, and will take it free from claims against the receiver to the same extent that its vendor held it so exempt. *Ryan* v. *Hays*, 62 Texas, 42."

A corporation is therefore nevertheless an indispensable party defendant to a stockholder's suit although it has distributed all its property among its stockholders and has ceased to transact any business,

> *Swan Land & Cattle Co.* v. *Frank*, 148 U. S. 603;
>
> *Thompson* v. *Stanley*, 20 N. Y. Supp. 317.

or although its property has all been sold under foreclosure:

> *Michel* v. *Betz*, 108 App. Div. (N. Y.) 241;
>
> *Harpending* v. *Munson*, 91 N. Y. 650;
>
> *Redfield* v. *Baltimore & Ohio R. R. Co.*, 124 Fed. 929;
>
> *Dormitzer* v. *Illinois & St. Louis Bridge Co.*, 6 Fed. 217.

In the case of *Swan Land & Cattle Co.* v. *Frank* (*supra*), the Court said (p. 611):

> "To take the present case out of the operation of the general rule, it is argued on behalf of appellants that the bill discloses such a practical abandonment of their franchises as to amount to a dissolution of the vendor corporations. We cannot so construe the bill. The dissolution of corporations is or may be effected by expiration of their charters, by failure of any part of the corporate organizations that cannot be restored, by dissolution and surrender of their franchises, with the consent of the state, by legislative enactment within constitutional authority, by forfeiture of their franchises and judgment of dissolution declared in regular judicial proceedings, or by other lawful means. *No such dissolution is alleged in the bill.* The averments that said corporations paid all their liabilities and thereafter distributed their remaining assets among their respective stockholders and have since made no use of their franchises and have no agent or officer upon whom process can be served, and no assets out of which any judgment against them could be satisfied, fall far short of a dissolution such as would prevent a suit against the corporations or their trustees, as provided by the laws of Wyoming, to establish the validity and amount of the appellants' claim for damages. (Secs. 506, 515.) The cases cited to the point that when the corporation is dissolved the necessity for making it a party is dispensed with need not therefore be reviewed. They are not applicable to the present case." (Italics ours.)

The case of *Dormitzer* v. *Illinois & St. Louis Bridge Co.* (*supra*), was a creditors' bill brought in the Circuit Court for the District of Massachusetts, to recover unpaid assessments upon the stock of the Bridge Company, a corporation of the State of Missouri. LOWELL, *J.*, said (p. 220):

> "I cannot see how it is possible, consistently with the decisions and the uniform practice, to

> decide this case in the absence of the corporation. If it had been actually dissolved, the case might be different. There are allegations, which come as near to that as truth will permit, I suppose: that it has ceased to do business; that its bridge has been sold under a foreclosure, and that it is defunct 'to all intents and purposes.' I do not understand this to mean that it is no longer capable of suing and being sued, but that it is dead for all useful purposes as a bridge owner. If it remains subject to process, the facts alleged appear to be immaterial. I infer, from the facts which are stated, that it is so liable at present."

Even where a corporation has been dissolved it should be made a party to a stockholder's suit, where the statute provides that it shall be deemed to continue in existence for the purpose of suing and being sued, in order to wind up its business.

Camp v. *Taylor*, 19 Atl. 968 (N. J. Ch. 1890).

The case cited was an action by stockholders of a corporation in respect to certain alleged mismanagement on the part of its directors. On demurrer to the bill the court held that the corporation was a necessary party to the action, in spite of the fact that it had been dissolved under the New Jersey statute, in view of the provision that in case of such dissolution the corporation should be deemed to continue in existence for the purpose of suing and being sued in order to wind up the business of the corporation.

See also the case of

Iron Cliffs Co. v. *Negaunee Iron Co.*, 197 U. S. 463,

in which the Court held that where a corporation is not itself made a party to the suit, complainant alleging that its corporate existence has ended, its rights cannot be adjudged even though certain per-

sons are made defendants on the ground that they are using the name of the corporation as a cover for their alleged wrongful acts, and they answer denying any personal interest and claiming that the corporation is a going concern and justify their acts as its agents. The Court proceeded upon the broad ground "that no person can be deprived of property rights by any decree in a case wherein he is not a party. Not being a party to the suit, the rights of the Pioneer Iron Company cannot be affected in any way by the decision of the Court."

(4)

The present case cannot be distinguished from those above cited. As is the case of *Swan Land & Cattle Co.* v. *Frank* (*supra*), the Houston and Texas Central Railway Company has no property and transacts no business, but there is no allegation in the bill that it has been dissolved On the contrary, it is named as a party defendant, and is treated throughout the bill as an existing corporation, capable of suing and of being sued. It is alleged in paragraph one that "at all the times hereinafter mentioned" the company "was a corporation organized and existing under and by virtue of the laws of the State of Texas" (*Record*, pp. 1, 2), and, in paragraph thirty-third, that a demand has been made upon the directors of the company to institute this action and that said demand has been refused (*Record*, p. 11). The bill does not even contain the allegations which the court in the *Dormitzer* case (*supra*), held to be insufficient to excuse the absence of the company as a party defendant that it has ceased to do business and is defunct "to all intents and purposes." As in that case so here, there is nothing to show that the company is not still capable of suing and being sued.

As a matter of fact and law, apart from the allegations of the bill, the old Railway Company is still subject to suit. The company, as appears from the

agreed statement of facts, was incorporated in 1848 under the name of the Galveston and Red River Railway Company by a special act of the legislature of Texas which contained no limitation upon the period of its corporate existence, the name of the corporation being changed in 1856 by another special act to the Houston and Texas Central Railway Company (*Record*, p. 66).* The new Houston and Texas Central Railroad Company, formed upon the foreclosure of the mortgages of the old Railway Company, was organized in pursuance of the provisions of the act of March 29, 1889, now Article 4550 of the Revised Statutes of Texas, quoted at page 55 of this brief (*Record*, p. 68). Prior to the enactment of this statute the only provision of the

*Texas. Special Laws, 1848, c. 204; An Act to establish the Galveston and Red River Railway Company: Section 1. *Be it enacted by the Legislature of the State of Texas*, That a body politic and corporate be, and the same is hereby created and established, under the name and style of the Galveston and Red River Railway Company, with capacity to make contracts, to have succession and a common seal, to make by-laws for its government, and in its said corporate name to sue and be sued, to grant and receive, and generally to do and perform all such acts and things as may be necessary or proper for, or incident to the fulfilment of its obligations, or the maintenance of its rights under this act, and consistent with the provisions of the Constitution of this State.

Special Laws 1856, c. 351; An Act Amendatory of and Supplementary to an Act to establish the Galveston and Red River Railway Company, and the several Acts Supplemental thereto. Sec. 1. *Be it enacted by the Legislature of the State of Texas*, That the Galveston and Red River Railway Company may change its name to that of the Houston and Texas Central Railway Company, and by that name may sue and be sued, grant and receive, and generally do and perform all such acts and things as they (*sic*) could legally do under their (*sic*) present name; and all acts heretofore done in said name shall be as binding upon said company and in favor of said company upon third parties in said new name as they were under the first name; and said change of name shall in no way forfeit or change any rights or liabilities now existing between said company and the State or third parties; Provided, that this act shall first be accepted by the president and directors of said company, and notice of said acceptance shall be filed in the office of the Secretary of State,

Texas statutes in reference to the reorganization of railroad companies upon foreclosure was the section which now constitutes Article 4549 of the Revised Statutes, viz.:

> "ART. 4549. *Road, etc., liable to be sold for debts.* In case of the sale of the entire roadbed track, franchise and chartered right of a railroad company, whether by virtue of an execution, order of sale, deed of trust or any other power, the purchaser or purchasers at such sale and their associates, shall be entitled to have and exercise all the powers, privileges and franchises granted to said company by its charter, or by virtue or the general laws; and the said purchaser or purchasers and their associates shall be deemed and taken to be the true owners of said charter and corporators under the same, and vested with all the powers, rights, privileges and benefits thereof, in the same manner and to the same extent as if they were the original incorporators of said company; and shall have power to construct, complete, equip and work the road upon the same terms and under the same conditions and restrictions as are imposed by their charter and the general laws (P. D. 4912)."

This section contemplated only a sale "of the entire roadbed, track, franchise and chartered right of a railroad company" under foreclosure. There was no provision for the sale of the property of a railroad company in parcels. This omission was supplied by the act of March 29th, 1889, now Article 4550 of the Revised Statutes of Texas, which provides as follows:

> "ART. 4550. *New Corporation, in case of Sale, may be formed, how.* In case of any such sale heretofore or hereafter made of the roadbed, track, franchise or chartered right of a railway company or any part thereof as mentioned in Article 4549, the purchaser or purchasers thereof and their associates shall be entitled to form a corporation under chapter one of this title, for the purpose of acquiring, owning, maintaining and operating the por-

> tion of the road so purchased as if such road or portion of the road were the road intended to be constructed by the corporation, and when such charter has been filed the said new corporation shall have all the powers and privileges conferred by the laws of this state upon chartered railroads, including the power to construct and extend; provided, that notwithstanding such incorporation, the portion of the road so purchased shall be subject to the same liabilities, claims and demands in the hands of the new corporation as in the hands of a purchaser or purchasers of the sold out corporation; provided, that by such purchase and organization no rights shall be acquired under any former charter or law in conflict with the provisions of the present constitution in any respect, nor shall the main track of any railroad once constructed and operated be abandoned or removed (Acts 1889, p. 19)."

In accordance with the provisions of this section, the property of the old Houston and Texas Central Railway Company was sold in two parcels, as set forth in the agreed statement of facts, one parcel, consisting of the Waco and Northwestern Division, to Mr. Downes, and the other, consisting of the residue of the property of the company, to Mr. Olcott (*Record*, p. 68). A new corporation, The Houston and Texas Central Railroad Company, was thereupon organized under the provisions of the Act of March 29, 1889, the charter of which was filed in the office of the Secretary of State of Texas on the 1st day of August, 1889 (*Record*, p. 68). To this corporation Mr. Olcott transferred the lines of railway of the old company purchased by him at the foreclosure sale (not including, however, the land grant of the old company) (*Record*, p. 68).

Article 4555 of the Texas Revised Statutes provides as follows:

> "ART. 4555. *After sale, old directors to be trustees.* Whenever a sale of the road-

bed, track, franchise and chartered powers and privileges is made as hereinbefore provided (unless other persons shall be appointed by the legislature or by some court of competent authority) the directors or managers of the sold-out company at the time of the sale, by whatever name they may be known in law, shall be the trustees of the creditors and stockholders of the sold-out company, and shall have full powers to settle the affairs of the sold-out company, collect and pay the outstanding debts, and divide among the stockholders the money and other property that shall remain after the payment of the debts and other necessary expenses; and the persons so constituted trustees shall have authority to sue by the name of the trustees of such sold-out company, and may be sued as such, and shall be jointly and severally responsible to the creditors and stockholders of such company to the extent of its property and effects that shall come to their hands (P. D., 4916)."

The foreclosure did not affect the corporate existence of the old Railway Company.

City Water Co. v. *State*, 88 Tex. 600.

Under the provisions of Article 4555 above quoted, it remained capable of suing and being sued, and, as conceded in the agreed statement of facts, suits have in fact been brought against it since the date of the foreclosure and the organization of the new Railroad Company (*Record*, p. 68). The date of the foreclosure sale was September 8, 1888, and the charter of the new Railroad Company was filed in the office of the Secretary of State August 1, 1889 (*Record*, p. 68). On February 3, 1890, a suit was instituted against the old company by the State of Texas to recover a portion of its land grant, which was carried to this Court.

Houston and Texas Central Railway Co. v. *Texas*, 170 U. S. 243 (1898).

Another similar action was instituted against the old company September 3, 1891.

Houston and Texas Central Railway Co. v. *State*, 89 Tex. 294 (1896).

Whether or not the old company be regarded as technically dissolved, it is still subject to suit and is therefore an indispensable party to the present action.

Camp v. *Taylor* and other cases cited *supra*.

X.

The Circuit Court could not obtain jurisdiction of the Houston and Texas Central Railway Company.

Section 1 of the act of March 3, 1887, c. 373 (24 Stat. 552; 1 U. S. Comp. Stat. (1901) 508), in reference to the jurisdiction of the Federal courts, provides in part as follows:

> "But no person shall be arrested in one district for trial in another in a civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that where he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

The concluding lines of the provision quoted "are to be read as a proviso to the general provision that

no civil suit shall be brought except in the district whereof the defendant is an inhabitant."

Wilson v. *Western Union Tel. Co.*, 34 Fed. 561, 564, quoted in *McCormick* v. *Walthers*, 134 U. S. 41, 43, approved in *Ex parte Wisner*, 203 U. S. 449, 459.

Under the act of 1887, a non-resident defendant can only be sued in the district of plaintiff's residence when he can be found within that district.

Pitkin Co. Mining Co. v. *Markell*, 33 Fed. 386, 387.

Dinzy v. *Illinois Central R. R. Co.*, 61 Fed. 49, 52.

Gale v. *Southern Building & Loan Association*, 117 Fed. 732, 734.

Kibbler v. *St. Louis & San Francisco R. R. Co.*, 147 Fed. 879.

Sweeney v. *Carter Oil Co.*, 199 U. S. 252, 257.

Gavin v. *Vance*, 33 Fed. 84, 85.

The act does not authorize service of process outside of the district where the action is brought.

Bourke v. *Amison*, 32 Fed. 710.

Cely v. *Griffin*, 113 Fed, 981.

Kirk v. *United States*, 124 Fed. 324; affd., 130 Fed. 112.

Jurisdiction cannot therefore be obtained by a Federal court over a foreign corporation in a personal action where the corporation transacts no business within the district where the action is brought.

Goldey v. *Morning News*, 156 U. S. 518.

Conley v. *Mathieson Alkali Works*, 190 U. S. 406.

Peterson v. *Chicago, Rock Island & Pac. R. R. Co.*, 205 U. S. 364,

Kendall v. *American Automatic Loom Co.*, 198 U. S. 477.

Craig v. *Welch Motor Car Co.*, 165 Fed. 554.

XI.

The Circuit Court properly dismissed the bill instead of remanding the case to the State Court.

(1)

> "In chancery proceedings a plea in bar may be set down for hearing by the complainant upon its sufficiency, or it may be replied to and put in issue. If the latter course is pursued and the plea is sustained, then, according to the English chancery practice, which formerly prevailed in this court, the bill must be dismissed, without reference to the equity arising from any other facts stated in the bill. *Hughes* v. *Blake*, 6 Wheat. 453, 472; *Rhode Island* v. *Massachusetts*, 14 Pet. 210, 257. This practice has now been modified by Equity Rule 33 of this court, which is as follows: 'The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.' See *Farley* v. *Kittson*, 120 U. S. 303, 314, 315; *Pearce* v. *Rice*, 142 U. S. 28, 41, 42. But even under this rule, when the plea meets and satisfies all the claims of the bill, it ought, in law and equity, to avail the defendant so far as to require a final decree in his favor."
>
> *Horn* v. *Detroit Dry Dock Co.*, 150 U. S. 610, 625.

The present case is within the rule laid down in the case cited. The pleas interposed by the defendants are to the effect that the Houston and Texas Central Railway Company is an indispensable party to the action; that is, cannot be brought by process within the jurisdiction; and that the action cannot proceed in its absence. We have shown in this brief both that the Railway Company is an indispensable party to the action and that no jurisdiction over it

can be obtained by the court in this action. The plea, therefore, fully "meets and satisfies" all the claims of the bill, for it appears that the complainant cannot get before the court the parties whose presence is necessary to the determination of the action. The Circuit Court, therefore, properly sustained the plea and rendered a final decree in favor of the defendants, dismissing the bill with costs.

(2)

Counsel for the appellants contend, in point II of their brief, that "if it be held that the Circuit Court had no jurisdiction to proceed with the case in the absence of the old railway company, the Court had no jurisdiction to decree a dismissal of the bill, but was bound to remand the cause to the State Court" (Appellants' brief, p. 18). This argument involves a confusion of ideas between a dismissal for want of jurisdiction, and a dismissal in the exercise of jurisdiction. (See the cases cited on page 28 of this brief.) Moreover, the cases cited by counsel for the appellants do not sustain their argument.

Section 5 of the Act of March 3, 1887, as amended by the Act of August 13, 1888 (24 Stat. 555; 25 Stat. 436; 1 U. S. Comp. Stat. (1901) 511), provides:

> "That if, in any suit commenced in the circuit court, or removed from the State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve *a dispute or controversy properly within the jurisdiction of said circuit court*, or that the parties to said suit have been improperly or collusively made or joined either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require." (Italics ours.)

The cases cited by counsel for appellants involve only the proposition where the dispute or controversy is not 'properly within the jurisdiction' of the Circuit Court, either by reason of the subject matter of the action or by reason of the citizenship of the parties, the suit will be remanded to the state court.

These cases have no bearing upon a case like the present, where the court has full jurisdiction of the subject matter, and there is the proper diversity of citizenship, but, owing to the non-residence of certain indispensable parties, they cannot be served with process.

(a) *Cases in which the Federal Court is without jurisdiction of the subject matter of the action.*

A number of the cases cited by counsel for appellants were actions instituted under statutes enlarging the equitable jurisdiction of the state courts. The cases having been removed to the Federal court, it was held that the statute in question did not apply there, and that, as the Federal court was without jurisdiction of the *subject matter* of the action, the suit did not involve a dispute of controversy properly within the jurisdiction of the Circuit Court under the removal act, and must therefore be remanded.

Cates v. *Allen*, 149 U. S. 451.
Gombert v. *Lyon*, 80 Fed. 305.
Peters v. *Equitable Life Assurance Society*, 149 Fed. 290.
Stockton v. *Oregon Short Line R. Co.*, 170 Fed. 627.
Cowley v. Northern Pacific R. R. Co., 159 U. S. 569.

In the case of *Cates* v. *Allen* (*supra*), the action had been brought in the Mississippi state court by a simple contract creditor, to set aside an alleged fraudulent conveyance. The case was removed by

the complainant to the Federal court, where a decree was entered in his favor. Upon appeal to the Supreme Court the decree of the Circuit Court was reversed, with directions to remand the case to the state court, upon the ground that, as complainant was not a judgment creditor of defendants, the suit did not involve a controversy properly within the jurisdiction of the Circuit Court. FULLER, *C. J.*, said, page 460:

> "So far as citizenship and amount were concerned the plaintiffs were entitled to file their petition for removal, *but the nature of the controversy was such that the suit was not properly cognizable in the Circuit Court* for the reasons heretofore given. While there are cases where the courts of the United States may acquire jurisdiction by removal from state courts when jurisdiction would not have attached if the suits had been originally brought therein, those are cases of jurisdiction over the parties and not of jurisdiction based upon the subject matter of the litigation, and furnish no rule for the disposition of cases such as that before us. But it is not to be concluded where diverse citizenship might enable the parties to remove a case but for the objection arising from the nature of the controversy, that, if such removal has been had, the suit must be dismissed on the ground of want of jurisdiction. On the contrary, we are of opinion that it is the duty of the Circuit Court under such circumstances to remand the cause." (Italics ours.)

See, also, the case of *Mississippi Mills* v. *Cohen*, 150 U. S. 202, where Mr. Justice BREWER said (p. 205):

> "See, also, *Scott* v. *Neely*, 140 U. S. 106; *Cates* v. *Allen*, 149 U. S. 451, in which a state statute extending the jurisdiction of equity to matters of a strictly legal nature was held inapplicable to the Federal Courts, and unavailing to vest a like jurisdiction in such courts sitting as courts of equity."

In the case of *Gombert* v. *Lyon* (*supra*), the action had been brought in the state court, under a state statute, to quiet title to certain premises of which the defendants were in possession. Upon the removal of the case it was held that the Federal court had no jurisdiction of the subject matter of the action and the case was remanded under the authority of *Cates* v. *Allen*.

The case of *Peters* v. *Equitable Life Assurance Society* (*supra*) also arose under a Massachusetts statute which was held inapplicable to suits in the Federal court. The case was therefore remanded on the ground that the Circuit Court was without jurisdiction of the subject matter.

In *Stockton* v. *Oregon Short Line R. Co.* (*supra*), the action was also based upon a state statute, but the motion to remand was denied upon the ground that the statute was applicable to the Federal court, which therefore had jurisdiction of the subject matter of the controversy.

The case of *Cowley* v. *Northern Pacific R. R. Co.* (*supra*), refers also to the question of the jurisdiction of the Federal court over the subject matter of the action.

(b) Cases in which the Federal Court is without jurisdiction of the parties.

The case of *Pollard* v. *Dwight*, 4 Cranch, 421, does not involve the proposition for which it is cited by counsel for appellants at page 18 of their brief. The question there was not as to the jurisdiction of the Court because of the non-service of process upon some of the defendants not within the state. The action was a foreign attachment brought by Dwight and others in the state court of Connecticut against Pollard and Pickett, who were citizens of Virginia. There were no other defendants. Pollard and Pickett appeared and removed the case to the Circuit Court, where after verdict and judgment against them they raised the objection that the Court did not

have jurisdiction over them, "the plaintiffs being citizens of Massachusetts and Connecticut and the defendants citizens of Virginia, not found in the District of Connecticut." This objection was not raised in the Circuit Court, but for the first time in the assignment of errors to the Supreme Court (see *Wabash Western Railway* v. *Brow*, 164 U. S. 271, 280). The Supreme Court held merely that by appearing in the action the defendants had waived the objection to the jurisdiction of the court and must be regarded as being in the same position as though they had been served with process (see *Toland* v. *Sprague*, 12 Pet. 300, 330; *St. Louis, etc., Ry.* v. *McBride*, 141 U. S. 127, 131, 132). The dictum that "were it otherwise" (*i. e.*, if the Court had not obtained jurisdiction over the defendants) "the duty of the Circuit Court would have been to remand the case to the State Court in which it was instituted and this Court would be bound now to direct that proceeding" is clearly correct, because, as stated in the case of *Insurance Co.* v. *Francis*, 11 Wall. 210, 215: "If the Court can see, on the case made by the plaintiff in his declaration, that the District Court acquired no jurisdiction over it, it is bound to reverse the judgment and direct the District Court to remand the cause to the state court in which it was instituted."

Neither the decision nor the dictum in *Pollard* v. *Dwight* has therefore any application to a case like the present, where the Circuit Court has jurisdiction both over the parties and the subject matter.

The case of *Stowe* v. *Santa Fe R. R. Co.*, 117 Fed. 368, cited by counsel for appellants at page 19 of their brief, is similar to *Pollard* v. *Dwight*. There, after the action had been removed, an alias summons was quashed and a motion was made to remand the case. The Court held only that

> "A suit in which the Circuit Court is powerless to acquire jurisdiction over the defendant's person does not involve 'a dispute or

controversy properly within the jurisdiction of said Circuit Court,'"

In the case of *Northern Pacific Co.* v. *Lowenberg*, 18 Fed. 339, cited by counsel for appellants on page 18 of their brief, the action had been brought by the plaintiff in the state court of Oregon against the defendants as tenants in common, to condemn certain land for railway purposes. Two of the defendants, who were citizens of New York, filed a petition for the removal of the case to the Circuit Court, alleging that as to them there was a separable controversy. Plaintiff filed a motion "to dismiss" the case upon the grounds that it did not involve a controversy within the jurisdiction of the Federal court; that there could be no final determination of the controversy so far as it concerned the removing defendants without the presence of the other defendants, and that there was no separable controversy as to the removing defendants. The court denied the motion to dismiss upon the ground that the suit did involve a separable controversy, saying, at page 341:

> "This motion is in form a mistake. It should have been 'to remand,' and not 'to dismiss.' If an action is improperly brought here by removal from a State Court, the proper remedy is a motion to remand."

(c) *Garnishment and Attachment Cases.*

The cases of *Purdy* v. *Wallace, Muller & Co.*, 81 Fed. 513; *Tootle* v. *Coleman*, 107 Fed. 41, 44, and *Wells* v. *Clark*, 136 Fed. 462, cited by counsel for appellants, hold merely that where an action has been begun in the state court by garnishment or attachment, so that a jurisdiction *in rem* has been acquired, the defendant cannot, upon the removal of the case to the Federal court, oust it of jurisdiction over the *res* because of lack of personal service.

See *Clark* v. *Wells*, 203 U. S. 164.

(*d*) *The Circuit Court had jurisdiction of the present action.*

Counsel for the appellants cite a number of cases in which it is said that after a defendant has removed a case to the Federal court and appeared generally there, he cannot be heard to object to the jurisdiction of that Court. These cases have no application to case at bar. We do not object to the jurisdiction of the Circuit Court, but on the contrary, we insist that it had jurisdiction of this action and that that jurisdiction was properly exercised in dismissing the bill.

(*e*) *The pleas must be decided in accordance with the Federal equity practice.*

While we do not object to the jurisdiction of the court, either as to the subject matter of the action or as to the parties before it, we contend that, as *a court of equity*, it cannot proceed to a determination of the action because of the absence of an indispensable party.

The removal act provides that, upon the removal of a case to the Circuit Court:

> "The cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit Court." (Act March 3, 1887, c. 373, as amended by Act Aug. 13, 1888, 24 Stat. 555; 25 Stat. 436; 1 U. S. Comp. Stat. (1901) 510.)

The pleas are, therefore, as proper in the present case as if the action had been originally commenced in this court. It is immaterial whether the same question could have been raised in the state court, for that does not affect the jurisdiction of the Circuit Court over the subject matter of the action or over the parties who are now before it.

> "The sole question, however, is whether the case was one properly removable from the

state court as it stood in that court at the time when the petition was filed. That question is to be determined by the condition of the pleadings and the record at the time of the application for removal and not by the allegations of the petition or the subsequent proceedings which may be had in the Circuit Court. *Barney* v. *Latham*, 103 U. S. 205; *Wilson* v. *Oswego Tp.*, 151 U. S. 56, 66."

Thomas v. *Great Northern Ry. Co.*, 147 Fed. 83, 86.

Where the grounds of jurisdiction exist, a party cannot be deprived of his constitutional privilege to have the suit not only entertained, but adjudicated in due course in the Federal forum.

Consumers' Gas Trust Co. v. *Quinby*, 137 Fed. 882, 893.

The real ground of appellants' argument is simply that they are not so well off in the Federal court as they would be in the state court. As pointed out at page 31 of this brief, this argument is unsound, but even if it were not, this would be no reason for remanding the case. There are many instances in which the practice in the Federal court differs materially from that of the courts of a state, but this has never before been urged as a ground why the court should not exercise a jurisdiction lawfully acquired.

(1) *Repleader on removal.*

It is the common practice, where a suit is removed from the state court which unites both legal and equitable causes of action, to order a repleader separating the legal and the equitable causes of action.

(2) *Equitable defenses not available on removal.*

Similarly, equitable defenses which have been pleaded in the state court are not available after the case has been removed.

Northern Pacific R. R. v. *Paine*, 119 U. S. 561.

In re Foley, 76 Fed. 390.

(3) *94th Equity rule applies on removal.*

So, also, where an action brought by a stockholder against a corporation in the state court is removed to the Federal court, the 94th equity rule applies upon the removal of the case, and a demurrer to the complaint will be sustained by the Circuit Court where it does not appear that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his shares have devolved on him since by operation of law.

Venner v. *Great Northern Ry. Co.*, 153 Fed. 408, 417.

(4) *Removal and quashing of service good in state court.*

It is well known that the law in regard to the service of process upon corporate officers is materially different in the Federal courts and in the State courts, and that where service has been effected in an action instituted in the state court, which would be held good there, it is the common practice to remove the case to the Federal court and there move to quash the service.

Goldey v. *Morning News*, 156 U. S. 518.

Remington v. *Central Pacific R. R. Co.*, 198 U. S. 95.

The present case differs in no way from the instances above referred to. The Circuit Court having held that the pleas should be sustained, a final decree in favor of the defendants dismissing the bill was proper. As the case involves "a dispute or controversy properly within the jurisdiction of" the Circuit Court, it could not be remanded (*Record*, p. 79).

XII.

The appeal should be dismissed, or, in the alternative, the decree appealed from should be affirmed, with costs.

Respectfully submitted,

ARTHUR H. VAN BRUNT,
Counsel for Appellees The Southern Pacific Company, The Houston and Texas Central Railroad Company and Central Trust Company of New York.

The Appellee, Farmers' Loan and Trust Company, hereby joins in the foregoing brief.

FREDERICK GELLER,
Counsel for Appellee,
Farmers' Loan and Trust Company.

Supreme Court of the United States.

HENRY L. BOGART, TOWNSEND LAWRENCE and ANITA LAWRENCE, as Executors of Walter B. Lawrence, suing on behalf of themselves and other stockholders, etc.,
Appellants,

AGAINST

THE SOUTHERN PACIFIC COMPANY *et al.*,
Appellees.

October Term, 1912.
No. 165.

BRIEF ON BEHALF OF APPELLEE, METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK.

Preliminary Point.

Without taking objection to appellant's statement of facts, this appellee desires to take exception to any characterization of the suit as one *belonging* to him and other minority shareholders.

It is true that the suit is in the *name* of the appellant and that the prayer of the bill asks that any recovery be paid over directly to appellant and the other minority shareholders in proportion to their

holdings in the Houston & Texas Central Railway Company (hereinafter called the Railway Company); but nevertheless the fundamental cause of action *belongs* to the Railway Company, and any recovery would have to be paid over to it, and not to its shareholders.

The necessity of paying over whatever might be recovered in this suit to the Railway Company, and not to its shareholders, as prayed in the bill, is at once apparent when it is remembered that the Railway Company is still an existing corporate organization, and that the *minority* shareholders have not the right to divide its assets among themselves without the consent of the majority or of the corporation or its creditors.

There is a deficiency of some $7,000,000 under the judgment entered against the Railway Company upon the foreclosure of the mortgages covering its properties at the time of the reorganization complained of (Agreed Statement of Facts, p. 69 of the Record). If, as prayed in the bill, any recovery must be paid to plaintiff and other minority shareholders, the way would be laid open to deprive creditors, without their consent, of their prior claims to the assets of the corporation, and minority shareholders could, without the consent of the majority, effect a distribution of the corporate assets, irrespective of whether minority shareholders have any such right under the statutes of the state chartering the Company. Yet to deprive the judgment creditors of the Railway Company of their lien on the assets of the Company without their consent and to enforce a distribution of its assets among its shareholders without the consent of the majority shareholders or of the corporation is what the appellant seeks to have decreed by a court of equity.

But, ignoring these inconsistencies, it is to be noticed that the complainant plainly recognizes that the cause of action does really *belong* to the Railway Company, because, in the allegations of his bill, he states that he is suing for himself and all other

minority shareholders (paragraph 34th of the bill, p. 12 of the Record), and makes the allegations required to be made in order to entitle a shareholder of a corporation to sue in behalf of the corporation under the Equity Rules of this Court (Old Rule 94). The prayer of the bill, that the recovery be paid over directly to the minority shareholders, therefore, appears to be a mere cloak to cover up the fact that the Railway Company is an indispensable party to this suit.

While it appears from the agreed statement of facts (p. 69 of the Record) that since the sale of the property of the Railway Company under the foreclosure above mentioned the Company has owned no property either in the State of New York or Texas or elsewhere, and has transacted no business in the State of New York, and none of the directors of the Company has come to or remained within the State of New York on the business of the Company, nevertheless the record fails to show that the Company has been dissolved or is not in possession of its powers as a legally existing corporate entity. Quite the contrary. The bill itself treats the Railway Company as a going concern.

POINT I.

The complainant has no right of direct appeal to this Court from the final decree herein. The appeal should, therefore, be dismissed.

This appeal is taken under subdivision 1 of Section 5 of the Judiciary Act of March 3rd, 1891, providing:

> "Section 5.—(*Appeals direct to Supreme Court, when.*—) That appeals on writs of error may be taken from the District Court or

from the existing Circuit Courts direct to the Supreme Court in the following cases:

"(1) In any case in which the jurisdiction of the court is *in issue*. In such cases the *question* of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision".

Appellant, in Point 3 of his brief, states

"The jurisdiction of the Court was in issue in the Circuit Court, so that the appeal was properly taken directly to this Court;"

and

"In view of the certification of the Court below and the plain facts in the case, it would seem unnecessary to argue this question at length."

This appellee by no means concedes that the jurisdiction of the Circuit Court was *in issue*, or that the appeal was properly taken directly to this Court.

It is submitted that, whatever may be stated by the Court below to be the grounds of its decision, said Court cannot, by any such statement, either in its judgment, its order allowing the appeal or its certificate, bind this Court and require it to hear an appeal directly from such judgment contrary to the provisions of subdivision 1 of Section 5 of the said Judiciary Act of March 3, 1891, if it appears from the record that the jurisdiction of the court below was not *in issue*. It is further submitted that this Court is not precluded by any such statement from determining for itself whether or no the jurisdiction of the court below, *as a federal court*, was *in issue*, and from dismissing this appeal, if it finds that it has been improperly taken (*Fore River Shipbuilding Co.* vs *Hagg*, 219 U. S., 175–177).

Appellant, in Point 3 of his brief, pages 23 and 24, contending that the recitals of the Court below, that a case was decided on jurisdictional grounds, should be controlling, cites *In re Lehigh Mining and Manu-*

facturing Company, 156 U. S., 322, and *Scully* vs. *Bird*, 209 U. S., 481. Neither of these cases sustains the point for which they are cited. So far as the questions under discussion are concerned, all that the Lehigh Mining and Manufacturing Company case holds is that the record in that case sufficiently complied with subdivision 1 of Section 5 of the Judiciary Act of March 3, 1891, and that a formal certificate was unnecessary; and the case of *Scully* vs. *Bird* merely holds that this Court would not assume an inconsistency to exist between the opinion of the lower court and its certificate.

Under the long line of decisions of this Court, it is only when the jurisdiction of a circuit or district court *as a federal tribunal* is *in issue* that an appeal may be taken directly to this Court (see, for example, the recent cases of *Chicago Board of Trade* vs. *Hammond Elevator Co.* (198 U. S., 424); *Fore River Shipbuilding Co.* vs. *Hagg* (219 U. S., 175–178–179); *Louisville Trust Co.* vs. *Knott* (191 U. S., 225); *Courtney* vs. *Pradt* (196 U. S., 89).

In the present case no question of jurisdiction of the Circuit Court as such was in issue on the making of the decree appealed from which dismissed the bill.

This was so because

(1) The proceedings on removal were regular;

(2) The district was the proper one;

(3) There was the necessary diversity of citizenship;

(4) The amount in issue was over $2,000;

(5) The subject matter was such that the suit could be removed to the federal court;

(6) All the defendants named in the bill, except the Railway Company, have been duly served or appeared; and

(7) The remaining defendant, the Railway Company, has never been served or attempted to be served.

These facts appearing, the jurisdiction of the Circuit Court, as such, *could not* be in issue. The only *issue* below was whether or no the Circuit Court, *as a court of equity*, in the *exercise* of the jurisdiction, that it admittedly had over parties before it, ought to proceed with the suit or to dismiss it because of the absence of the Railway Company, on the ground that it was an indispensable party, That is, the only *issue* before or decided by the Circuit Court was whether or no the Railway Company was an indispensable party. This was a question of general law applicable to any court of equity, and not peculiar to a federal court as such, nor involving any issue as to the *jurisdiction* of the Court. It was *not* a question of *whether* the Circuit Court had jurisdiction; it was a question of *how it should exercise* the jurisdiction that it had. (The italics are ours.)

Shields vs. *Barrow*, 17 How., 130–141:

> "As is observed by this Court * * * when speaking of a case where an indispensable party was not before the court, 'we do not put this case upon the ground of *jurisdiction*, but upon a much broader ground, which must *equally apply* to *all courts* of *equity*, whatever may be their structure as to jurisdiction; we put it on the ground that *no* court can adjudicate directly upon a person's right *without the party* being either actually or constructively *before* the court.'" (The italics are ours.)

In *Venner* vs. *Great Northern Ry.*, 209 U. S., 24, this Court (Mr. Justice Moody delivering the opinion), said at page 34:

> "The dismissal of the bill *would not be a denial, but the assertion and exercise of jurisdiction.* So it was that in Hawes *vs.* Oakland the demurrer was sustained and the bill dismissed, not for want of jurisdiction, but, in the words of the Court * * * 'because the appellant shows no stand-

> ing in a court of equity, no right in himself to prosecute this suit'. This very question was considered by the Court in the Illinois Central Railway Company *vs.* Adams, 180 U. S., where it was said, page 34: * * * 'It (jurisdiction) exists in the Circuit Courts of the United States under the express terms of the Act of August 13, 1888, if the plaintiff be a citizen of one State, the defendant a citizen of another, if the amount in controversy exceed $2,000, and the defendant be properly served with process within the district. Excepting certain quasi-jurisdictional facts necessary to be averred in particular cases and immaterial here, these are the only facts required to vest jurisdiction of the controversy in the Circuit Courts. *It may undoubtedly be shown in defense that plaintiff has no right under the allegations of this bill or the facts of the case to bring suit, but that is no defect of jurisdiction, but of title.* It is as much so as if it were sought to dismiss an action of ejectment for want of jurisdiction, by showing that the plaintiff had no title to the land in controversy.'" (The italics are ours.)

Scully vs. *Bird*, 209 U. S., 481, citing *Osborn* vs. *Bank of the United States*, 10 Wheat., 858, where Chief Justice Marshall said:

> "The State not being a party on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the Court ought to make a decree."

In the last case the State was not named in the bill, and so, of course, was not served. In the present case the Railway Company is named, but admittedly has not been served. The question is the same, though the method of raising it is different. In a case where an indispensable party is not named, the way to raise the question would be by demurrer, pointing out the defect and naming the indispensable party. Where the party is named, but no attempt made to serve him, the defect cannot be taken advantage of by demurrer,

because it does not appear on the face of the bill, and consequently the defect must be brought to the Court's attention by motion or plea.

The appellant, in support of the statement in his brief, at page 24, "as the Court below decided the cause on the ground of jurisdiction, the appeal was properly taken directly to this Court," cites four cases, to wit:

> *Shepard* vs. *Adams*, 168 U. S., 618;
> *Chicago Board of Trade* vs. *Hammond Elevator Company*, 198 U. S., 424;
> *Kendall* vs. *San Juan Mining Co.*, 144 U. S., 658;
> *Nashua Railway Co.* vs. *B. & L. Railway*, 136 U. S., 336 (correct citation p. 356).

The case of *Kendall* vs. *San Juan Mining Co.*, concerns no relevant question. The only point as to jurisdiction decided in the case of *Nashua Railway Co.* vs. *B. & L. Railway Co.* was that a New Hampshire corporation was entitled to bring a bill in the United States Circuit Court for Massachusetts against a citizen of Massachusetts, and that the corporation's union or consolidation with another corporation of the same name, organized under the laws of Massachusetts, did not extinguish or modify its charter as a citizen of New Hampshire, or give it such additional citizenship in Massachusetts as to defeat its right to go into the said federal court.

The case of *Chicago Board of Trade* vs. *Hammond Elevator Company* was a case in which the Circuit Court had dismissed the bill upon the ground that it had *never acquired* jurisdiction over the Hammond Elevator Company by a *valid* service of process, because the individuals who were served, in the attempt to acquire jurisdiction, were not officers of the Elevator Company, a Delaware corporation. Mr. Justice Brown, delivering the opinion of this Court, said, at page 432:

> "There is, however, a preliminary question in this Court; that is, whether we can law-

> fully entertain this appeal under Section 5 of the Act of March 3, 1891, * * *. The proper construction of this section has been the subject of frequent consideration in this Court, and it has been definitely settled that it must be limited to cases where the jurisdiction of the federal court *as a federal court* is put in issue, and that *questions of jurisdiction applicable to the state courts, as well as to the federal courts, are not within its scope.*" (The italics are ours.)

In the case of *Shepard* vs. *Adams* it was likewise held that when the Court below has not acquired jurisdiction over the defendant by proper service, the judgment can be reviewed by writ of error sued out directly to this Court.

In the last two mentioned cases the question was *whether* the Circuit Court had acquired jurisdiction over the defendant by proper service of process. They are not in point to show that, in the case at bar, jurisdiction was in issue; quite the contrary. Said cases are distinguished from the case at bar in that, in the present suit, there is no *issue* as to the validity or invalidity of process or of the service of process upon any party. There was no *issue* as to whether the Railway Company had been properly served. It is admitted that no attempt has been made to serve the Railway Company, and that no service can be made upon it. The only *issue* before the Circuit Court in the case at bar was whether or not the Court, *as a court of equity*, could proceed with the suit without the presence of the Railway Company. The Court held that the Railway Company was an indispensable party, and therefore dismissed the suit.

This appellee asks that the Court dismiss this appeal on the ground that the jurisdiction of the lower court as a federal court was not in issue.

A formal motion to dismiss is not necessary. The first and fundamental question always considered by this Court is that of jurisdiction to hear the

appeal, even when the point is not raised by the parties.

Fore River Shipbuilding Co. vs. *Hagg*, 219 U. S., 175, at page 177.

POINT II.

The Railway Company is an indispensable party.

The decisions of this Court and of the Courts of New York and Texas all agree that where a corporation has not been dissolved, it is an indispensable party to a shareholder's suit, like the present. To avoid repetition, the Court is respectfully referred to the cases cited on this point in the brief for the Southern Pacific Company.

The rule above stated is not an artificial or technical one, but a rule of merit and natural justice. One of the principles of equity is that it abhors a multiplicity of suits and inconclusive litigation, and that it will not undertake to render a decision in a case in which it cannot do justice to all the parties concerned (*Shields* vs. *Barrow*, 17 How., 130).

Now it is plain that the complainant is not the real party in interest. The real party in interest is the Railway Company. That is to say, it is to enforce the cause of action that the Railway Company has against the Southern Pacific Company that the complainant puts the court in motion.

It is also plain that if, in the absence of the Railway Company, the Southern Pacific Company were, under penalty of contempt, decreed to pay over money or property to the Railway Company, nevertheless the Railway Company could not, in its absence, be bound by said decree (see quotation from *Shields* v. *Barrow*, page 6 hereof). Such a

decree and payment thereunder by the Southern Pacific Company would not satisfy or discharge the Railway Company's cause of action against said Southern Pacific Company; and, notwithstanding, such decree and payment, the Railway Company could at any time bring suit in its own name for the very same cause of action under which, in its absence, it had been decreed that the other defendant should make such payment. This would clearly be the rankest injustice to the defendant ordered to make the payment. If, on the other hand, it were decreed that the defendant Southern Pacific Company was not in any way liable to the Railway Company, such decree would be equally inoperative against it, and in spite thereof, the Railway Company would be at liberty at any time to commence another suit against said defendants, when the issues would be tried all over again, with possibly different results. No court of equity, therefore, ought, in the absence of the Railway Company, ever to render any decree other than that of dismissal.

It is a novel idea that the appellant advances, that a court of equity ought to undertake to render a judgment on a cause of action fundamentally belonging to a party who is not before the court. If the *real* plaintiff is not an indispensable party to his own cause of action, who is an indispensable party? On appellant's theory, why not also omit the real defendant, and settle all disputes without the presence of any of the parties primarily concerned?

The insolvency of a corporation and the sale of all its assets for the benefit of its creditors does not occasion a dissolution of the Company, and the corporation is nevertheless an indispensable party in a stockholder's suit to recover property or profits of which the corporation has been deprived, and this although it has no assets and has ceased to transact any business. The Railway Company is still, according to the bill and agreed statement of facts, an existing corporate organization, and has directors,

although it is insolvent and does no business. If it should get all that complainant asks in his bill, it would be a very live corporation indeed.

We beg to refer to the argument and citations on this point in the brief of counsel for the Southern Pacific Company. See, also, *Steel* vs. *Culver*, 211 U. S., 26, Mr. Justice Holmes, delivering the opinion of this Court, saying, at page 29:

> "With regard to the alleged insolvency, it is a strange proposition that a defendant is not an indispensable party to an attempt to stop the collection of a judgment against him because at the moment his property is not sufficient to pay his debts."

When a party brings a suit, particularly one that is likely to be difficult and expensive to try, which can never reach any positive or final result, there is nothing more just and equitable than that it should be dismissed at the outset. To hold otherwise would have the result of encouraging useless litigation.

The Railway Company is an indispensable party to this suit, and the Court properly so held.

POINT III.

Section 737 of the United States Revised Statutes and (old) Equity Rule No. 47 fail to support appellant's contention that the Circuit Court should not have dismissed the bill because the Railway Company was never before the Court by service of process or voluntary appearance.

No case has come to our attention which holds that an *indispensable* party to a suit may be dropped for the purpose of sustaining the jurisdiction of the

United States Courts. In fact, the very contrary has been held in a long line of decisions of this Court prior to and since the decision in the leading case of *Shields* vs. *Barrow*, 17 How., 130, decided at the December Term of this Court (1854), citing the case of *Cameron* vs. *McRoberts* and other often cited cases.

Appellant begs the question when he states that this case is one in which the Railway Company is a "*proper*" party, and that the object of the provisions of the statute and the equity rule above referred to was to prevent the United States Courts from dismissing in just such cases as the present, and that the decision of the Circuit Court appealed from averse to this contention was erroneous. He not only begs the question, but he assumes too much. He begs the question when he says that the Railway Company was a "*proper*" party; and he assumes too much, when he says that the above-mentioned statute and rule apply to "*indispensable*" parties. This Court has long recognized the distinction between the three classes of parties, to wit: "*proper*," "*necessary*" and "*indispensable*"—(*Shields* vs. *Barrow*, 17 How, 130—1854, and numerous cases following and developing the distinction there stated). It is deemed unnecessary to cite cases at length, but merely to state the general well-known rule:

(*a*) "*Proper*" or "*formal*" parties are those having such a relation to the subject matter of the suit that, while they may be joined, the Court can dispense with them, if made parties, and the plaintiff may or may not join them without making his bill objectionable in either event.

(*b*) "*Necessary*" parties are those who, if their interest in the subject matter were called to the attention of the Court, would be required to be brought in, if within the jurisdiction, if so doing would not oust the jurisdiction, but who are not so

indispensable to the relief asked as to prevent the Court from entering a decree in their absence.

(*c*) "*Indispensable*" parties are those whose interests are so bound up in the subject matter of the litigation and the relief sought that the Court cannot proceed without them or reach a final decree without affecting their interests,—that is, their rights must be unavoidably passed upon in rendering a final decree. Such persons must be made parties, even though the effect is to oust the jurisdiction of the Court.

That the Railway Company was an "indispensable" party to the present suit and so does not come within Section 737 of the U. S. Revised Statutes or (old) Equity Rule No. 47, see cases Point II of this brief. See, also, the leading cases of *Shields* vs. *Barrow* (17 How., 130), and *Coiron* vs. *Millaudon* (19 How., 113); *Gregory* vs. *Stetson* (133 U. S , 579), and the long line of cases following these decisions.

Appellant, in urging that the Court below should have remanded, instead of dismissing the case, tries to bring himself within the rule of those cases where the action was remanded because:

(*a*) Of some irregularity in proceedings on removal;

(*b*) Of an objection to the District;

(*c*) Of lack of requisite diversity of citizenship;

(*d*) Of insufficiency of the amount involved;

(*e*) The subject matter was such that in no event could the suit be removed.

But the case at bar is plainly distinguished from said authorities, since no such question was here involved. Admittedly every one of the prerequisites to the Circuit Court taking jurisdiction existed. The Court below therefore properly dismissed the suit since it could not (under Section 737 or Rule 47) —drop the Railway Company as a party defendant.

POINT IV.

Appellant cannot complain because the case has been removed to the Circuit Court and then dismissed for lack of an indispensable party; removal, no matter with what consequences, is a constitutional right. Nor can appellant complain that the case was not remanded.

The jurisdiction of the federal courts is granted by the constitution and laws of the United States, and the right of a non-resident defendant in a proper case to remove is absolutely guaranteed to him by the same supreme authority.

The right to remove the case includes the right to have the federal courts hear and determine *every* question that may arise therein to the exclusion of the State Court.

In *Southern Railway* vs. *Miller* (217 U. S., 209), Mr. Justice Day, delivering the opinion of this Court, said, at page 217:

> " By complying with the removal act, the State Court lost its jurisdiction and upon the filing of the record in the Federal Court that court acquired jurisdiction. It thereby had the authority to hear, determine and render a judgment in that case to the exclusion of every other court."

The appellant, in his brief, point 2, page 18, says that if the Court had been right in its view that the old Railway Company was an indispensable party, the conclusion follows that the case should have been remanded to the State court, and not that the federal court should sustain the plea and dismiss the bill. But appellant is not right in his contention, and the cases he cites do not support him.

The authorities hold that where the necessary di-

versity of citizenship exists, the amount in controversy exceeds $2,000 and the subject matter is such that the suit may be removed to the federal court, and it has been regularly removed to the Circuit Court in a proper District, said Circuit Court should retain jurisdiction for all purposes, even for the mere purpose of dismissal.

In *Venner* vs. *The Great Northern Railway Co.* (209 U. S., 24), the Court maintained jurisdiction in the cause merely to dismiss. The Court said:

> "The dismissal of the bill would not be a denial, but the assertion and exercise of jurisdiction."

Innumerable cases could be quoted, including appellant's own citations to show that a removed action should never be remanded unless one or more of the essential prerequisites to the Circuit Court's jurisdiction is lacking. As already stated, these prerequisites are only:

(1) That the proceedings on removal be regular;

(2) That there be no objection to the District;

(3) That the necessary diversity of citizenship exists;

(4) That the amount in controversy be over $2,000; and

(5) That the subject matter be one which permits the action to be removed.

While it is true that the federal court, when the case is once properly removed, will retain jurisdiction to hear and determine the cause and render a final decree, even if it be a mere decree of dismissal, nevertheless, this does not alter the general rule

that a decree of dismissal not involving the merits terminates only the particular suit, and does not bar any other suit that may be brought by the plaintiff on the same cause of action in a State or Federal Court.

Southern Railway v. *Miller*, 217 U. S., 200.

On the point of hardship it was said in *Swan Land and Cattle Co.* vs. *Frank* (148 U. S., 603) at page 612:

> "It does not help the matter that complainant could not get the vendor corporation before the Circuit Court for the Northern District of Illinois. That fact in no way affects the question of there being necessary [indispensable] parties without whose presence no decree could be rendered against the appellees."

See, also, *Shields* vs. *Barrow* (17 How., 130), where the Circuit Court retained jurisdiction of a suit in which one of the indispensable parties was not before the Court and proceeded to hear the case on the merits. The case was finally brought here on appeal, and Mr. Justice Curtis, delivering the opinion of the Court, said at page 146:

> "This Court regrets that a litigation which has now lasted upwards of thirteen years, should have proved wholly fruitless; but it is under the necessity of reversing the decree of the Circuit Court, ordering the cause to be remanded, and the original and cross-bills dismissed."

Surely, in the face of this ruling, appellant has no cause to complain because the learned Judge below dismissed his bill.

But in any event, complainant would not have been any better off if the suit had been remanded to the State Court in order that he might there serve the Railway Company by publication, because, once the Railway Company were so served, the absolute

right would exist to have the case again removed, service quashed and the bill dismissed.

Fritzlen vs. *Boatmen's Bank*, 212 U. S., 364;
Remington vs. *Central Pacific R. R. Co.*, 198 U. S., 95;
Board of Trade vs. *Hammond Elevator Co.*, 198 U. S., 424;
Kendall vs. *American Automatic Loom Co.*, 198 U. S., 477;
Green vs. *Chicago, Burlington & Quincy Ry. Co.*, 205 U. S., 530;
Mechanical Appliance Co. vs. *Castleman*, 215 U. S., 437;
Chase vs. *Wetzlar, Executor*, 225 U. S., 79, at pp. 88 and 89.

As already shown, this Court has time and again recognized the unqualified right to have a case removed merely for the purpose of dismissal (see foregoing cases).

It is certainly no hardship to dismiss a litigation which in the end must come to naught; quite the contrary.

Whether or no, as appellant claims, the Railway Company could have been served by publication in the State Court, or the cause could "have been tried" in such court is immaterial, because it is no hardship on a complainant if a defendant exercises his constitutional right of removal, no matter what the result; but, even on the question of law we do not agree that such service could have been made or the cause there tried. It is true that Section 438 of the New York Code provides that a non-resident foreign corporation may be served by publication; but (in a personal action like the present, where no attachment can be levied) such service is, under well-known decisions of this Court, beginning with *Boswell's Lessee* v. *Otis*, 9 How., 669, followed by *Pennoyer* v. *Neff*, 95 U. S.

417, etc., utterly worthless to confer any jurisdiction on a State Court to render a decree binding on the defendant so served.

It was certainly a novel request to ask a Federal Court to remand to a State Court a suit which the Federal Court was about to dismiss for the lack of service on an indispensable party because the State Court rules would permit service on said party in a manner that would render the enforcement of any decree contrary to the Federal Constitution under the decisions of this Court.

LAST POINT.

The appeal should be dismissed because improperly taken to this Court. In the event that this Court should decide to hear the appeal, then the decree of the Circuit Court dismissing the bill should be affirmed.

Respectfully submitted,

TOMPKINS McILVAINE,
Counsel for Appellee, Metropolitan Trust Company of the City of New York.

Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 165.

HENRY L. BOGART, TOWNSEND LAWRENCE and ANITA LAWRENCE, as Executors of Walter B. Lawrence suing on behalf of themselves and other stockholders, etc.,

Appellants,

vs.

THE SOUTHERN PACIFIC COMPANY ET AL.,

Appellees.

REJOINDER TO APPELLANTS' REPLY BRIEF.

ARTHUR H. VAN BRUNT,
Counsel for Appellees,
The Southern Pacific Company,
The Houston & Texas Central Railway Company and Central Trust Company of New York.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

Supreme Court of the United States,

OCTOBER TERM, 1912.

No. 165.

HENRY L. BOGART, TOWNSEND LAWRENCE and ANITA LAWRENCE, as Executors of Walter B. Lawrence, suing on behalf of themselves and other stockholders of the Houston and Texas Central Railway Company, similarly situated, who may come in and contribute to the expenses of the action,

Appellants,

vs.

THE SOUTHERN PACIFIC COMPANY, FREDERIC P. OLCOTT, CENTRAL TRUST COMPANY OF NEW YORK, FARMERS' LOAN AND TRUST COMPANY, METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, THE HOUSTON AND TEXAS CENTRAL RAILROAD COMPANY and HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY,

Appellees.

REJOINDER TO APPELLANTS' REPLY BRIEF.

The new matter in appellants' reply brief seems to reqnire a word by way of rejoinder.

The case of *MacArdell vs. Olcott* was brought to set aside the foreclosure sale in respect to the property of the old Company—Houston and Texas Central Railway Company—and to annul the reorganization agreement in regard thereto on the ground of fraud and it was not until an adverse decision had been affirmed by the Appellate Division of the New York Supreme Court (*104 A. D., 263*), in which opinion that Court pointed out among other facts that the Southern Pacific Company got the stock of the new Company—Houston and Texas Central Railroad Company—not by reason of its being the majority stockholder of the old Company but because it was practically the sole creditor (p. 270) that the able counsel presenting appellants' case in the Court of Appeals, who had not appeared either at the trial or on the argument in the Appellate Division, recognizing the hopelessness of his case upon the theory on which the complaint had been drawn, devised the new theory upon which the case was presented to the Court of Appeals and tried to convince that Court that questions were raised by the bill of complaint of great importance which had not been passed on by the Court below, and this situation required a reversal of the judgment.

A majority of the Court (Judge HISCOCK writing) held that the bill had been brought, as stated above, for the purpose of setting aside the foreclosure sale and to annul the reorganization agreement on the ground of fraud, had been tried upon that theory and that it was too late in the appellate court for the plaintiff to attempt to shift his ground, and affirmed the judgment.

The Circuit Court of the United States when discussing the scope of the MacArdell case in its opinion upon the motion to remand took the view that the Court of Appeals had held, to-wit, that the cause of action there set up was not the one attempted to be set up in the present action but was as set forth in Judge HISCOCK's opinion. Judge CHATFIELD said :

"A long statement of facts on the present application seems unnecessary. Certain litigation has been had in the state courts, resulting in the dismissal of the complaint. *MacArdell v. Olcott* (189 N. Y., 368 ; 82 N. E., 181). A second action upon allegations growing out of the same state of facts, but setting forth a different cause of action, has been begun in the Supreme Court of the county of Queens in the state of New York by Walter B. Lawrence on behalf of himself and other stockholders of the Houston & Texas Central Railway Company against Southern Pacific Company, Frederic P. Olcott, Central Trust Company of New York ; The Houston & Texas Central Railroad Company and Houston & Texas Central Railway Company."

Record, page 37.

It is clear, therefore, that regardless of the statements in appellants' reply brief to the contrary, that all courts which have considered the question are of the opinion that the cause of action set forth herein is distinctly different from that in MacArdell vs. Olcott, though depending upon the same state of facts.

If the theory of the present action is as stated in appellants' reply brief, that the Southern Pacific Company as majority stockholder received the stock of the new Company—Houston and Texas Central Railroad Company—it is erroneous in fact. Whatever the Southern Pacific Company received it got as a *creditor* of the old Company, for, as stockholder, it received precisely the same rights as the other stockholders. This appears from the reorganization agreement, Exhibit A to the complaint, and, particularly, that it took as creditor from the opinion of the Appellate Division in the MacArdell case.

"The Southern Pacific Company was a large creditor of the corporation and as such became a party to this reorganization scheme. The fact that this creditor

was also a stockholder of the Company and controlled a majority of the stock is no reason why it should not protect itself as a creditor of the insolvent corporation; and all its acts, so far as is disclosed by this record, were entirely justified by its relation as creditor of the corporation" (*104 A. D., 263, 270*).

Appellants, in their reply brief, attempt to show that the old Company is not an indispensable party by suggesting, in the event of the ultimate success of the plaintiff the form the decree on the merits should take, in their opinion, and claim plaintiffs would be entitled to a direct judgment against the Southern Pacific Company.

This position is just such a shift as was made in the MacArdell case in the Court of Appeals. An examination of the bill shows clearly that it was drawn upon the theory that the cause of action was in the old Company and all the allegations necessary to maintain such an action, including a demand upon the directors to bring the action and a refusal by them, are set forth.

See main brief, pages 33-43.

But apart from the frame of the complaint the injury complained of is not one personal to the plaintiff, but an injury to every stockholder of the old Company. The cases are clear where the injury is one to all stockholders of the corporation, the right of action is in the corporation, and that regardless of the prayer.

De Neufville vs. N. Y., etc., Ry. Co., 81 Fed. Rep., 10.

Cases cited on page 34 of main brief.

In reply to the claim that creditors of the old Company would be entitled to share in any recovery, it is urged that this is not the case, because they were wiped out by the foreclosure decree. It is true that the interests of creditors in the mortgaged property was cut off by the foreclosure decree

but this did not in any way affect their rights to other property of the old Company not covered by the mortgage. It is clear, therefore, that in the event of a recovery herein the amount thereof must be paid to the old Company for the purpose of distribution. Hence it follows there can be no question but that the old Company—Houston and Texas Central Railway Company—which has not been and cannot be served with process in this action, is an indispensable party and as the Circuit Court had jurisdiction of the action the dismissal by that Court of the complaint "*for lack of parties*" was proper.

Respectfully submitted,

ARTHUR H. VAN BRUNT,

Counsel for Appellees The Southern Pacific Company, The Houston and Texas Central Railroad Company and Central Trust Company of New York.

Supreme Court of the United States,

OCTOBER TERM, 1912. No. 165.

HENRY L. BOGART, TOWNSEND LAWRENCE and ANITA LAWRENCE, as Executors of Walter B. Lawrence, suing on behalf of themselves and other stockholders, etc.,

Appellants,

against

SOUTHERN PACIFIC COMPANY, *et al.*,

Appellees.

APPELLANTS' BRIEF.

JAMES A. O'GORMAN,
A. J. DITTENHOEFER,
H. SNOWDEN MARSHALL,
DAVID GERBER,
Counsel for Appellants.

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Supreme Court of the United States.

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Appellants,

against

SOUTHERN PACIFIC COMPANY, *et al.*,

Appellees.

October Term, 1912.

No. 165.

Statement.

The original appellant in this case, Walter B. Lawrence, died pending the appeal, and his executors, Henry L. Bogart, Townsend Lawrence and Anita Lawrence, were substituted in his place as appellants on the first day of April, 1912.

This is an appeal from a final decree of the United States Circuit Court for the Eastern District of New York dismissing the bill of the complainant (pp. 80-81).

The Judge who signed the decree certified that a question of jurisdiction of the Circuit Court was

decided adversely to the complainant and that by reason thereof, and not otherwise the final decree was entered (pp. 81-82).

The suit was commenced in the New York Supreme Court for the County of Queens, and was thereafter removed by certain of the defendants to the Federal Court (p. 35). Two motions to remand were made by complainant and denied; the defendants then interposed pleas to which replication was filed by the complainant, and the pleas were heard on an agreed statement of facts (p. 66). The decree dismissing the bill resulted from the decision upon these pleas in favor of the defendants and against the complainant (pp. 70-79).

The defendant's position in the last analysis is that, assuming the plaintiffs to have a perfect cause of action, there is no court to which they may submit their grievance for determination. If they start proceeding in a state court which has jurisdiction of all the parties the defendant contends it may be removed into the Federal court only for the purpose of dismissing the bill, as was done at bar; and if the suit should be commenced in the Federal court the same result will follow. So that the contention is made for the first time that stockholders of a corporation, having justifiable cause for complaint, can find no court in which they may have a hearing on the merits.

Specification of Errors.

The Court erred in sustaining the pleas of the defendants and holding that the Houston & Texas Central Railway Company was an indispensable party.

(Assignment of Errors 1, 2 and 5, p. 83.)

The Court erred in dismissing the cause, whereas it should have remanded it to the State court after it determined the Railway Company was an indispensable party.

(Assignment of Errors 3 and 4, p. 83.)

The Bill of Complaint.

The complainant brought suit on behalf of himself and of all of the other stockholders of the Houston & Texas Central Railway Company (p. 12).

The defendants named were the Southern Pacific Company, Frederick P. Olcott, Central Trust Company of New York, Farmers' Loan & Trust Company, Metropolitan Trust Company of the City of New York, The Houston & Texas Central Railroad Company and Houston & Texas Central Railway Company.

All of these defendants appeared in the action with the exception of the last-named defendant, the Houston & Texas Central Railway Company, and it was owing to the fact that this defendant was not served and did not appear that the court held itself to be without jurisdiction to proceed with the action and dismissed the bill (p. 81).

The bill of complaint in substance alleges that the complainant was a stockholder of the Houston & Texas Central Railway Co. owning stock of the par value of $10,000 at all the times of the grievances of which he complained (pp. 1-2); that the defendant the Southern Pacific Company was the owner of the majority of the stock of the said Houston & Texas Central Railway Company (p. 2); that the

Railway Company became involved in various difficulties and litigations (pp. 3-6); that suits were brought against the Railway Company to foreclose various mortgages which the Railway Company had placed upon its property, all of which suits were in May, 1886, consolidated into one case in the Circuit Court of the United States for the Eastern District of Texas (p. 6). It is alleged that in said suit then pending the Railway Company had interposed to the suits to foreclose its mortgages good and valid defenses on the ground that the mortgages were not due (p. 6), and that these defenses were never litigated, and the interposition of said defenses prevented the foreclosure of any mortgage upon the property (p. 6).

It is further alleged that thereafter the defendant the Southern Pacific Company, which was the majority shareholder of the Railway Company, entered into negotiations with the holders of bonds under the mortgages which the company had issued, which negotiations resulted finally in the formation and execution of a reorganization agreement, a copy of which is annexed to the bill (p. 7). By the terms of this agreement it was provided that all existing mortgages should be foreclosed (p. 14); that new mortgages should be placed upon the property, and the new bonds should be distributed to the holders of the bonds secured by the old mortgages. A new company was to be organized to acquire the property (p. 14), and the capital stock of this company was to be distributed in a way that offered better terms to the Southern Pacific Company, the majority shareholder of the Railway Company, than were offered to the com-

plainant and the other minority shareholders of that company (p. 7 and p. 17).

This reorganization agreement was carried out practically according to its terms (pp. 7-8). The Southern Pacific Company procured the carrying out of the reorganization agreement and the withdrawal of all the defenses in the pending suits, which had theretofore been interposed by the Railway Company; in consequence of this withdrawal of defenses there was a foreclosure sale on May 4, 1888, and a new company was organized and acquired the Railway Company's property, and executed the new mortgages called for by the reorganization agreement, and distributed the new bonds to the bondholders pursuant to the terms of the reorganization agreement (p. 8).

Certain large land grants held by the Railway Company were not acquired by the new Railroad Company, but were disposed of through trust indentures as additional security for the new mortgages, substantially along the lines provided in the reorganization agreement. The details of that disposition are not important for the present statement.

Stock in the new company was offered to the complainant and other minority shareholders on prohibitive terms (p. 9), and none of the minority shareholders of the old company complied with the terms or took the stock. All of the said stock was taken over by the Southern Pacific Company, the majority shareholder of the old company, on the favorable terms which had been provided for it in the reorganization agreement to which it had been a party. The stock was and is of great value, and the Southern Pacific Company has made great

profit by its ownership and control of the stock (p. 9). The Southern Pacific Company acquired the said stock, which was of the par value of $10,000,000, through and by means of its ownership and control of a majority of the stock of the old Railway Company and because it caused the Railway Company through its control of that company to withdraw the defenses to the suits which it had brought against the Railway Company, and to give consent to the foreclosure decree and to the carrying out of the reorganization agreement (p. 9).

The acquisition of the said stock by the Southern Pacific Company was in consideration of the performance by the Railway Company of corporate acts and the withdrawal by the Railway Company of the defenses which had been interposed for the benefit of the Railway Company and all its stockholders. The delivery of the whole stock of the new company to the Southern Pacific Company was a part of and in consideration of a composition between the old Railway Company and its mortgage creditors set out and described in said reorganization agreement. The mortgage creditors of the old Railway Company, pursuant to this composition in the reorganization agreement, permitted the Southern Pacific Company to take the whole capital stock of the new company in consideration of the withdrawal by the old company of defenses which prevented the foreclosure of the mortgages (pp. 9-10).

The relief demanded by the complainant was, among other things, that it be adjudged and decreed that the Southern Pacific Company acquired the said stock and all the profits and earnings received upon it as trustee for the complainant and

other minority stockholders who may come in and contribute to the expenses of this litigation in accordance with the respective rights of the parties to be adjusted by the court (p. 12).

The substance of the grievances alleged by the complainant is that he was a minority shareholder in a company of which the Southern Pacific Company was the majority shareholder; that this majority shareholder, when the Railway Company got in difficulties, made a composition with the creditors of the Railway Company one of the terms of which was that the Southern Pacific Company should get all of the equity in the reorganized property; that what the Southern Pacific Company gave in this composition to the mortgage creditors of the Railway Company was the withdrawal of defenses to the suits pending against the company; that the majority shareholder had no right to take the whole benefit of this composition to the exclusion of the minority shareholders; and that such a state of facts required that a trust be impressed on the stock which the Southern Pacific Company acquired through this proceeding for the protection of the rights of the complainant and others similarly situated.

Other details concerning the complaint will be referred to in the ensuing argument.

Proceedings in the Suit Below.

The defendants Southern Pacific Company, Frederick P. Olcott and the Houston & Texas Central Railroad Company (the new company), all being non-residents of New York, removed the cause into the United States Circuit Court for the Eastern District of New York (pp. 30-36), where the com-

plainant made a motion to remand (p. 36), which was denied (p. 41), the Court writing an opinion upon the denial of the motion (pp. 37-40). Thereupon the defendants Central Trust Company of New York, Farmers' Loan & Trust Company and Metropolitan Trust Company respectively appeared (pp. 41-42).

The defendants Southern Pacific Company, Frederick P. Olcott and Houston & Texas Central Railroad Company thereupon filed a plea claiming that the Houston & Texas Central Railway Company was a proper, necessary and indispensable party to the suit; that said Railway Company has not been and cannot be brought by process within the jurisdiction of the court, and that without the presence of the said company no complete or final justice can be done or decreed; and prayed that the bill be dismissed (pp. 42-43). A similar plea was filed by the Central Trust Company of New York (p. 44), and by the Farmers' Loan & Trust Company of New York (p. 46), and by the Metropolitan Trust Company of New York (p. 47).

To this plea the complainant filed replications (pp. 49-52). Thereafter, in view of the nature of the pleas interposed by the defendants, the complainant filed another motion for leave to renew its motion to remand and for a remanding of the case upon the ground that it had been removed into the Circuit Court, which could not get jurisdiction of the Railway Company, from the Supreme Court of the State of New York, which could acquire jurisdiction over all of the defendants (pp. 52-53). This motion was supported by an affidavit of the complainant showing that in the State Court where the action was originally brought, jurisdic-

tion could be obtained over all the defendants (pp. 54-56).

The motion was denied by the Circuit Court (p. 57).

Thereafter the defendant Frederick P. Olcott died (April 15, 1909), and the defendants moved that the suit be dismissed because he was an indispensable party and his executors were appointed in New Jersey and could not be brought into the action by the service of process (pp. 57-60).

Judge CHATFIELD wrote an opinion on this motion (pp. 61-65), and denied it (pp. 65-66).

The parties then filed an agreed statement of facts upon which to submit the pleas theretofore interposed by the various defendants (pp. 66-70). It appeared in this statement of facts that the Railway Company, whose absence from the jurisdiction was the basis of the pleas, had been incorporated under a special act of the Texas Legislature in 1848 (p. 66); that it had incurred various indebtedness and gotten into various difficulties (p. 66); that the foreclosure in May, 1888, had taken place (p. 67); that its property had been sold under the foreclosure (pp. 67-68); that the reorganization agreement had been carried out and a new company organized (p. 68); that mortgages pursuant to the reorganization agreement had been executed (p. 68). It was further stipulated that nine named persons had been elected as directors in 1885, at the last election held by the Railway Company (p. 69); that three of these were living (p. 69). It was stipulated that all of the properties and franchises of the old Railway Company were sold under the foreclosure decree for a sum seven million dollars less than the amount decreed to be due, and

that this deficiency has remained unpaid and is uncollectible (p. 69).

It was further stipulated that since the sale of the property under the foreclosure in 1888 the company has owned no property in any State, has transacted no business, has had no place of business in the State of New York, and that none of the three surviving directors ever come to New York upon the business of the company; that no meetings of the stockholders of the Railway Company have been held since the day of the foreclosure, and no meeting of the directors has been held since June, 1890 (p. 69).

The pleas having been submitted to the court on this statement of facts, Judge CHATFIELD wrote an opinion (pp. 70-79), holding in favor of the defendants, and upon said opinion ordered (p. 80) that unless service was effected upon the old Railway Company within five days from September 14, 1910, a final decree should be entered dismissing the bill; and thereafter and on September 23, 1910, the old Railway Company not having been served, he entered a final decree dismissing the bill (pp. 80-81), and made his certificate that the jurisdiction of the court was in issue (p. 81).

For the Federal courts to dismiss the suit on the ground that they have no jurisdiction, and at the same time to refuse to send it back to the State court, which concededly has jurisdiction, leads to the unconscionable result that the complainant with a good cause of action, is by judicial decree turned out of every forum, not on the merits, but on a bald technicality, and left remediless, subverting the maxim that there can be no wrong without a remedy.

POINT I.

The Circuit Court had jurisdiction to proceed with the case in spite of the fact that the old railway company was not brought before the court by service of process or voluntary appearance.

The view taken by the Circuit court was that in a suit brought by a minority stockholder for the benefit of himself and all other stockholders the corporation is an indispensable party.

Many cases can be cited to support this proposition as a general proposition, but the rule is not inflexible. In a great many cases where the facts were like those in the case at bar it has been held that the corporation is not an indispensable party.

Kidd v. New Hampshire Traction Co., 72 N. H. 273;

Fletcher v. Newark Telephone Co., 55 N. J. Eq. 47;

Crumlish v. Shenandoah Valley Rd. Co., 28 W. Va. 623;

In the present case the relief which the minority stockholders are asking is of a character which does not necessarily require the presence of the old railroad company. The minority shareholders say, in effect, that the majority shareholder obtained for itself profits for which it gave as consideration the surrender of defenses to suits brought against the corporation. The plaintiffs claim, in effect, that what was derived by the withdrawal of cor-

porate defenses was taken by the majority shareholder as trustee for all of the shareholders, and could not be taken by that majority shareholder for itself alone (p. 12).

Further, from the stipulated facts it appears that the old corporation was dead in everything but name; that it had held no meetings and transacted no business since 1888 (p. 69); and that it was buried under a debt that was unpaid and uncollectible (p. 69).

The present suit falls rather under the rule laid down by Judge MARTIN in the case of *Kuchler* v. *Greene*, 163 Fed. Rep. 91, and by Judge WALLACE in *Irvin* v. *Oregon R. & N. Co.*, 20 Fed. 577. The old corporation was undoubtedly a proper party, but was not indispensable.

Section 737 of the United States Revised Statutes provides:

> "When there are several defendants in any suit at law or in equity. and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the Court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it, but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-rejoinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."

Equity Rule 47 provides:

> "In all cases where it shall appear to the Court that persons, who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their

> being out of the jurisdiction of the Court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the Court as to the parties before the Court, the Court may, in their discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."

The court below was of opinion that in spite of the provision of law and the equity rule above quoted, he was without jurisdiction to proceed with the case. In this we submit he was clearly in error. The case was one in which the old railroad company was a proper party—in which, in the language of the equity rule above quoted, the old railroad company "might otherwise be deemed a necessary or proper party." But the object of the provisions of law above quoted and of the rule was to confer jurisdiction upon the United States Circuit Court in just such a case as the present one, and the decision of the court adverse to this contention was erroneous.

Rogers v. Penobscot Mining Co., 154 Fed. Rep. 606.
Sioux City Terminal R. & W. Co. v. Trust Co. of N. A., 82 Fed. 124.
Kuchler v. Greene, 163 Fed. Rep. 91.
Irvin v. Oregon Railway & Nav. Co., 20 Fed. 577.
Slater Trust Co. v. Randolph-Macon Coal Co., 166 Fed. 171.
Payne v. Hook, 7 Wall. 425.
Barney v. Baltimore, 6 Wall. 280.
Elmendorf v. Taylor, 10 Wheat. 167.
Anthony v. Campbell, 112 Fed. 212.

Wellman v. Howland Coal & Iron Works, 19 Fed. 51.
North Carolina Mining Co. v. Westfeldt, 151 Fed. 290.
Fletcher v. Newark Tel. Co., 55 N. J. Eq. 47.
Hunter v. Robbins, 117 Fed. 920.
Conery v. Sweeney, 81 Fed. 14.
Union Mill Co. v. Danberg, 81 Fed. 73.
Newton v. Gage, 155 Fed. 598.
Howe v. Howe, etc., Co., 154 Fed. 820.
Watson v. Nat. Life & T. Co., 162 Fed. 7.
Traders Bank v. Campbell, 81 U. S. 87.
Fisher v. Schropshire, 147 U. S. 133.

In some of the cases above cited the Federal courts have held that they had jurisdiction to proceed with the cause in spite of the absence of a defendant whose position was nearly analogous to that occupied in the present case by the old Houston & Texas Central Railway Co.

The cases relied upon by the defendants below were all cases where a minority stockholder of *a going* concern sued for relief in behalf of his company, such as *Redfield* v. *Baltimore & Ohio Railroad Co.,* 124 Fed. Rep. 929, where the court expressly said:

> "If the corporate entity had become extinct a different situation would present itself; but the plaintiff is evidently of the opinion that the old Staten Island Company *is still vigorous and hearty,* and I see no reason to take a different view of the matter."

We do not believe that there is any case where the Federal Court has decided that it was power-

less to proceed with a case on account of want of jurisdiction due to the absence of a defendant who was as little concerned with the outcome of the case as is the old railway company in this case.

Judge Wallace said in the case of Irvin v. Oregon Rwy. & Nav. Co., 20 Fed. 577, at page 581:

> "There does not seem to be any good reason why the Oregon Steam Navigation Company should be deemed an indispensable party. It is not a going concern. If the sale of the property should be set aside the corporation would be only a dry trustee for the purpose of dividing the property among the beneficial owners."
>
> * * * * * * *
>
> "Although the corporation may not be effectually extinguished as against creditors, there is no difficulty in concluding that it is so far extinct that it cannot stand in the way of the enforcement by its former stockholders of their equitable rights to a fair accounting from those who have assumed to distribute its assets."

The Supreme Court of the United States, in Payne vs. Hook, 7 Wall. 425 at p. 431, said:

> "The necessity for the relaxation of the rule is more especially apparent in the Courts of the United States, where, oftentimes the enforcement of the rule would oust them of their jurisdiction, and deprive parties entitled to the interposition of a court of equity of any remedy whatever. (West v. Randall, 2 Mass. 181; Story Eq. Pl., Sec. 80 *et seq.*)"

The Court said, in Elmendorf vs. Taylor, 10 Wheaton, 167:

> "In the exercise of its discretion, the court will require the plaintiff to do all in his power

> to bring every person concerned in interest before the court. But, if the case may be completely decided as between litigant parties, the circumstances that an interest exists in some other person, whom the process of the court cannot reach, as if such party be a resident of some other state, ought not to prevent a decree upon its merits. It would be a misapplication of the rule to dismiss the plaintiff's bill because he has not done that which the law will not enable him to do."

In Wellman v. Howland Coal & Iron Works, 19 Fed. 51, the Court said:

> "* * * The corporation still had a legal existence, but not an actual one. * * * While, therefore, this corporation is not defunct, it has no living, active existence, although in law it may survive sufficiently to have the power of reorganization for some purposes. Its present status makes the reasons which apply to a defunct corporation apply to this one. * * * The motion to remand to a state court is overruled."

The Twenty-fifth Equity Rule promulgated by the United States Supreme Court last November, which goes into effect February 1, 1913, provides that:

> "Fourth. If there are persons other than those named as defendants who appear to be proper parties, the bill should state why they are not made parties—as that they are not within the jurisdiction of the court, or cannot be made parties without ousting the jurisdiction."

It is to be noted that in the State court where this case was originally brought the provisions of the State statutes regarding service of non-

residents were such that service by publication could have been had upon the old railway company and thus all of the parties could have been brought before the court. (§438, Code Civil Pro.)

Grant v. Greene Cons. Co., 59 Misc. 1 (affirmed 193 N. Y. 306).
Pope v. Terra Haute Car & Mfg. Co., 87 N. Y. 137.
Grant v. Cananea Co., 189 N. Y. 241.

The Court below frankly conceded the effect of his action. He pointed out that the interpretation which he was giving to the Acts of Congress was not to give the Federal courts jurisdiction of a removed cause for the sake of hearing and determining that cause, but was giving it jurisdiction to be availed of by the defendants so as to take the plaintiff from a forum where his case could be heard and compel him to litigate in a forum where his case could not be heard and from which he could not escape with the possibility of bringing his action in any other court (p. 77).

The reasoning of the Court below is one which confers a very dangerous power upon the Federal court—and it is submitted that it was to avoid this very danger that section 737 of the Revised Statutes was enacted, and that Equity Rule 47 was promulgated. Here some of the defendants have, as the judge below concedes, removed a case from a court where it could be tried with all parties present into a court in which one of the parties could not be served with process. The object of the removal was not to try the case, but to kill it on a technicality. The court, apparently conceding that this was the object of the defendants, in-

terprets the Federal statutes so strongly against his own jurisdiction that he concludes that he is bound to sustain the point taken by the defendants.

It is submitted that this decision is supported by no precedent and is contrary to the plain language of the statute and the rule of the court, and that the court below had jurisdiction to try the issue presented by the bill of complaint, whether the old railway company was made a party or not.

POINT II.

If it be held that the Circuit Court had no jurisdiction to proceed with the case in the absence of the old railway company, the Court had no jurisdiction to decree a dismissal of the bill, but was bound to remand the cause to the State Court.

If the court had been right in its view that the old railway company was an indispensable party, the conclusion should have followed that the case should be remanded to the State court, where it could be tried, and not that the Federal court should sustain the plea and dismiss the bill.

Cates v. Allen, 149 U. S. 451.
Northern Pacific Co. v. Lowenberg, 18 Fed. Rep. 339.
Davis v. Gray, 16 Wall. 223.
Pollard v. Dwight, 4 Cranch. 421.
Gombert v. Lyon, 80 Fed. 305.

Purdy v. Wallace Muller & Co., 81 Fed. 513.
Wells v. Clark, 136 Fed. 462.
Tootle v. Coleman, 107 Fed. 44.
Stowe v. Santa Fe Railroad Co., 117 Fed. 368.
Richmond v. Brookings, 48 Fed. 241.
Cowley v. Northern Pacific R. Co., 159 U. S. 569.
Courtney v. Pradt, 196 U. S. 89.
Postal Co. v. So. Ry. Co., 122 Fed. 156.
Peters v. Equitable Life Ins. Soc., 149 Fed. Rep. 290.
Stockton v. Oregon, 170 Fed. 627.
Johnson v. Computing Scale Co., 139 Fed. 339.

There are instances where a cause was removed from a State court which had, or could have secured jurisdiction over the defendant, *and the question of service upon that defendant raised in the Federal court*, as in the well-known case of Goldey v. Morning News Co., but in no case did the court refuse to remand the cause under circumstances similar to those at bar, and lay down the doctrine that a removal may be had *only to aid a defendant in escaping all liability to account for his misconduct before any forum.*

The Removal Act was intended to further justice not to obstruct and defeat it. Its purpose was to permit a defendant to secure the benefit of a trial in a court where there was no danger because of local prejudice, or question of his securing full and complete justice, but no one has yet successfully contended that the effect of the Removal Act

was to aid in obstructing and defeating a trial before *any* tribunal.

Section 5, of the Act of March 3rd, 1875, provides:

> "If in any suit commenced in a Circuit Court or removed from a State Court to a Circuit Court * * * it shall appear to the satisfaction of such Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of such Circuit Court * * * the said Circuit Court shall proceed no further therein but shall dismiss the suit or remand it to the court from which it was removed, as justice may require."

1 Rose's Code Federal Procedure, §818, p. 753, says:

> "These words are not used interchangeably, but 'dismiss' applies to suits brought in the Circuit Court, and 'remand' to suits removed thereto."

In Northern Pacific Co. v. Lowenberg, 18 Fed. 339, the court said, at page 341:

> "* * * The words 'dismiss' and 'remand' are not used interchangeably or indiscriminately in Section 5 of the Act of 1875 (18 St. 472). The former has reference only to a suit brought in the Circuit Court, and the latter to one removed there from the State Court. In the one case, if it appears that the suit is not cognizable in the Circuit Court, it is dismissed, and in the other it is remanded to the State Court."

In Cates vs. Allen, 149 U. S. 451, the court said:

> "But it is not to be concluded where adverse citizenship might enable the parties to

remove a case but for the objection arising from the nature of the controversy, that, if such removal has been had, the suit must be dismissed on the ground of want of jurisdiction. *On the contrary, we are of the opinion that it is the duty of the Circuit Court under such circumstances to remand the cause.*" (Italics ours.)

In Wells vs. Clark, 136 Fed. 462, the court held:

> *"The removal statute cannot be construed as to permit a defendant to oust the original jurisdiction of a State Court by removal, and then obtain a dismissal of the action in a Federal Court for want of jurisdiction."* (Italics ours.)

The court saying at page 466:

> "Where a petitioner relies solely upon a diversity of citizenship for removal, any construction which will allow a suit to be removed solely for the purpose of dismissing it, would not be sound."

The following are the five cases cited in respondent's brief below, and relied upon by the trial Judge to sustain his position in dismissing the case for lack of jurisdiction, and not remanding it to the State court where jurisdiction could be obtained of all the parties:

Goldey v. Morning News, 156 U. S. 518.

Conley v. Mathieson Alkali Works, 190 U. S. 406.

Craig v. Welch Motor Car Co., 156 Fed. 554.

Peterson v. Chicago, Rock Island & Pac. R. R. Co., 205 U. S. 364.

Kendall v. American Automatic Loom Co., 198 U. S. 477.

The cases of Goldey v. Morning News, Conley v. Matheson Alkali Works and Craig v. Welch Motor Car Co. were motions to set aside the service of a summons against the defendant, after the case had been removed into the Circuit Court, and the cases of Peterson v. Chicago, Rock Island & Pacific R. R. Co. and Kendall v. American Automatic Loom Co., were originally commenced in the Circuit Court. The Peterson case was dismissed for lack of proper service on the defendant, and in the Kendall case service of the summons was set aside.

In none of these cases could the case have been remanded; the last two originated in the Circuit Court, and the first three were motions to set aside service of a summons so there was nothing to remand after the motions were granted.

These cases are, therefore, entirely different from that at bar, where the State court had and could obtain jurisdiction of all the necessary parties, and the Circuit Court, after the removal, had jurisdiction of all the necessary parties, except that it is claimed the defendant Railway Company was also a necessary party, and the case was dismissed for lack of jurisdiction of the Federal court, because of the absence of the said Railway Company.

POINT III.

The jurisdiction of the court was in issue in the Circuit Court, so that the appeal was properly taken directly to this court.

In view of the certificate of the court below and the plain facts in the case, it would seem to be unnecessary to argue this question at length.

The court below construed, adversely to its jurisdiction a Federal statute passed manifestly for the purpose of extending the jurisdiction of the Federal courts. The court also assumed that there existed in the Federal court a jurisdiction to deny a motion to remand and dismiss a case which could be tried in the State court. A more important question of jurisdiction than is involved in this last proposition could hardly be stated.

The final decree recites that the bill is dismissed "on the ground that the court has not jurisdiction to proceed further with the cause, for the reason that the Houston & Texas Central Railway Company is an indispensable party. * * *" (pp. 80-81). The certificate recites that the court "certifies to the Supreme Court of the United States that *in the above-entitled cause the jurisdiction of this court to proceed with the same was in issue,* and was decided adversely to the plaintiff, *and that by reason thereof and not otherwise* the order and decree of the 14th day of September, 1910, and the final decree of September 23, 1910, shown in the record herein, were entered" (p. 81). The order allowing the appeal recites that it is allowed "upon the ques-

tion of jurisdiction of this Court over the cause of action" (p. 86).

The above recitals by the court below that the case was decided on jurisdictional grounds should be controlling.

In re Lehigh Mining & Mfg. Co., 156 U. S. 322.

Scully v. Bird, 209 U. S. 481.

As the court below decided the cause on the ground of jurisdiction, the appeal was properly taken directly to this Court.

Section 5 of Act of March 3, 1891 (26 St. L. 827).

Chicago Board of Trade v. Hammond Elevator Co., 198 U. S. 424.

Sheppard v. Adams, 168 U. S. 618.

Kendall v. San Juan Mining Co., 144 U. S. 658.

Nashua Railway Co. v. B. & L. Railway, 136 U. S. 336.

THE DECREE DISMISSING THE BILL OF COMPLAINT SHOULD BE REVERSED, AND THE CASE SENT BACK TO THE COURT BELOW FOR TRIAL, IF THIS COURT CONCLUDES THE TRIAL COURT HAD JURISDICTION, OR LACKING JURISDICTION, THE COURT BELOW SHOULD BE INSTRUCTED TO REMAND THE CASE TO THE STATE COURT FROM WHENCE IT WAS REMOVED.

Respectfully submitted,

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H. SNOWDEN MARSHALL,
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Supreme Court of the United States.

OCTOBER TERM, 1912—No. 165.

HENRY L. BOGART, TOWNSEND LAWRENCE AND ANITA LAWRENCE, AS EXECUTORS OF WALTER B. LAWRENCE, SUING ON BEHALF OF THEMSELVES AND OTHER STOCKHOLDERS, ETC.,

Appellants.

against

SOUTHERN PACIFIC COMPANY *et al.*,

Appellees.

APPELLANTS' REPLY BRIEF.

JAMES A. O'GORMAN,
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H. SNOWDEN MARSHALL,
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Counsel for Appellants.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1912. No. 165.

HENRY L. BOGART, TOWNSEND LAWRENCE and ANITA LAWRENCE, as Executors of Walter B. Lawrence, suing on behalf of themselves and other stockholders,

Appellants,

AGAINST

SOUTHERN PACIFIC COMPANY *et als.*,

Appellees.

APPELLANTS' REPLY BRIEF.

The argument of our adversaries that the old Railway Company is an indispensable party is based on a complete misconception of the nature of this case and of the relief to which the minority share holders are entitled.

We concede the correctness of the statement in Mr. VAN BRUNT'S brief that there has been a great deal of litigation in this case preceding the present suit. This litigation may be divided into two classes: All of the cases preceding the case of *McArdell* v. *Olcott* (189 N. Y., 368), were suits in which some effort was made to enjoin or rip up or

destroy the reorganization and affect the status of the new security holders who had taken their securities under the reorganization plan. Each of these cases failed for various reasons not affecting the merits of the present controversy in any way at all. A great number of technical questions were decided in one way or another, but the merits of the case were never decided by any judge in any of these cases.

In the *McArdell* case the plaintiff attempted to assert the same claim that is asserted in the present case. It was held by the Court of Appeals of New York, however, that he could not maintain this position because in his bill and on the trial below he had charged fraud. It was held that he could not on appeal claim that a trust should be impressed upon the profits realized by the Southern Pacific Company for the reason that upon the trial below the case had been put upon a different theory.

In the *McArdell* case, however, two judges dissented, and these two judges are the only two of all the judges who have considered this bewildering mass of litigation who have ever passed upon the merits of the controversy. Judge EDWARD T. BARTLETT, with whom concurred Judge VANN, of the New York Court of Appeals, were both of the opinion that the plaintiff had a good cause of action, and that the majority of the court were wrong in holding that he was estopped from asserting it by reason of the theory on which the case had been tried below.

That case having been thus decided, the present suit was brought, and the theory on which the case stands is a simple and clear one. The theory of the minority shareholders is, as stated by Judge BARTLETT in his dissenting opinion in *McArdell* v. *Olcott* (189 N. Y., 368, at p. 392):

> "The present position of the plaintiffs is not inconsistent with the finding of the trial court that the purchasers at the foreclosure sale acquired a good title. The Southern Pacific

> Company, the majority stockholder of the old company, received the entire issue, $10,000,000 stock of the new company, and plaintiffs seek after a full accounting and adjustment of mutual rights between it and them to impress a trust on the net property of the old company for the benefit of minority stockholders."

The case of *McArdell* v. *Olcott* was argued on behalf of the minority shareholders in the Court of Appeals of New York by the late EDWARD M. SHEPARD, and from his brief we quote as follows:

> "Granting that one corporation controlling another, which undertakes to manage the affairs of that other, and to make contracts for the other corporation, assumes a trust relation to the stockholders of the controlled corporation, the consequences which we have here asserted must follow.
>
> "We take it that in asserting that the controlling corporation occupies towards the stockholders of the controlled corporation the same fiduciary position occupied to those stockholders by the directors, or the corporation itself, this Court meant to assert that all of the ordinary consequences attending the trust relation applied to such a situation as this.
>
> "If the directors of the Houston and Texas Central Railway Company after reorganization had appeared in possession of the whole equity in the property conceded to the Houston and Texas Central Railway Company in a settlement with the creditors, the position would be precisely the same as is presented where the majority stockholder appears after the settlement in possession of that equity.
>
> "We concede that, as the case appears in this court, it must be assumed that all allegations in the complaint of actual fraud are unproved except so far as the existence of fraud follows as a necessary conclusion of law from the undisputed facts.
>
> "Does the plaintiff in this action have to sustain the burden of showing actual fraud?
>
> "The ordinary rule bearing on this sub-

ject is thus stated in Pomeroy's Equity Jurisprudence, Section 1077, where the writer speaks of the duty of the trustee or agent not to accept any inconsistent position, or enter into any relation, or do any act inconsistent with the interests of the beneficiary. It is said:

"'The most important phase of this rule is that which forbids the trustees and all other fiduciaries from dealing in their own behalf with respect to matters involved in the trust, and this prohibition operates *irrespectively of the good faith or bad faith of such dealing.*'

"It is pointed out in the text of this writer, on the authority of numerous cases, that when the party occupying the fiduciary relation is found to have made personal profit from transactions of any character whatsoever involving the trust property, there arises at once, by operation of law in the *cestui que trust* the right,

"(*a*) If no other rights have intervened, to set the transaction aside;

(*b*) If other rights have intervened, to have a trust impressed upon all proceeds realized by the trustee or fiduciary out of dealings with the trust property.

"To such a claim it is held in innumerable cases that it is no defense for the fiduciary to show absolute good faith; it is no defense to show the acquisition of the trust property at a judicial sale; it is no defense to show that the sale was open, and that the price realized and paid for the trust property was fair and adequate.

"We earnestly submit that, if the doctrine which makes the majority stockholder, or the corporation controlling the majority of the stock, a trustee in respect to the corporate property, is not to be rendered wholly nugatory, this same ordinary principle of the law of trusts must apply to a trustee of this description."

In the present case, before the foreclosure and reorganization of the old Company, the Southern

Pacific Company, which was the majority shareholder of the old Company, controlled less than four-sevenths of the stock which represented the equity in the old railroad. It controlled some $4,000,000. par value of stock out of a total issue of $7,726,900. (p. 2). After the reorganization the Southern Pacific Company turned up in possession of the whole equity of the reorganized company. It accomplished this result by making a bargain for its own benefit through the reorganization agreement and securing for itself in that reorganization agreement the whole of the equity of which it had theretofore held less than four-sevenths.

Supposing, now, that when this case comes to a trial its merits will at last be passed upon, and supposing that the judge who decides the case comes to formulate a decree, what can he do? This is the test by which we ask the court to decide whether the old company is or is not an indispensable party.

We submit that the decree would provide that, in dealing with the Texas litigation, and making a compromise of it through its control of the old company, the majority shareholder was a trustee for all the shareholders of the old company; that as such trustee the Southern Pacific Company was bound to share, on equal terms, with its fellow-shareholders all that it realized out of that reorganization; that it should account for all profits that it had made, and that it should be credited with all expenses that it had incurred, and that the balance shown on this accounting should be divided between the Southern Pacific Company and the minority shareholders in the proportion of their holdings in the old corporation.

If we are right in claiming that this is the relief which a judge would give if he agreed with Judges BARTLETT and VANN of the New York Court of Appeals, it is perfectly plain that the old company is not an indispensable party, and that full relief can be given in this suit without any more parties before the court than have now appeared in the suit.

We may be asked, then, why the old company was made a party at all. Our answer is that in minority-shareholder litigations, even when the shareholders are litigating with each other, it has become a sort of cut and dried custom to make the corporation a party. It will be noted that even in the many cases which we have cited on our main brief, where in stockholders' litigations the corporation has been held not to be an *indispensable* party, the pleader in each instance nevertheless had joined the corporation as a party.

Furthermore, under the New York State practice —and it will be remembered that this case was instituted in the State courts of New York—there was no reason for not joining the old corporation, as the decisions of the highest courts of the State of New York are flatly to the effect that in such a case service on the old corporation by publication would have been effective. (*Grant* v. *Green*, 59 Misc., 1, aff. under title of *Grant* v. *Cobre Grande Copper Co.*, 193 N. Y., 306).

Again, in the bill, allegations were made necessarily involving the actions and conduct of the old company. For instance, it was claimed that acting under the control of the defendant, the Southern Pacific Company, the old company had surrendered its defenses to the suit, and it was deemed proper and appropriate that the old company should be made a party and given a chance to answer these allegations. The claims made in the brief of our adversaries that the old company or its creditors might have some interest in the recovery in the present suit, are of themselves sufficient reason for making the old company a party to the present suit. However far-fetched these claims may be, it would be an advantage to have them litigated and disposed of now rather than after a final decree.

All of this, however, leads to the conclusion that the old company, while a proper party, was never in any sense an indispensable party to the suit.

We observe that considerable stress is laid in the

briefs of our adversaries upon the effect of this suit upon creditors of the old company. We fail to follow this argument at all. When the reorganization occurred in Texas, and the creditors who had claims subordinate to the mortgage creditors found themselves cut out, it may possibly be that they had rights which they might have enforced. So far as the record shows, none of them attempted to enforce any rights. They might have claimed that the reorganization scheme was in fraud of their rights, and for the purpose of cutting them off. They apparently did not do so. They all seem to have acquiesced in the fact that the foreclosure decree completely destroyed their claims against the old company.

But entirely distinct from the claims of creditors is the claim of the minority shareholders. It is probable that the creditors were properly cut off, and that the reorganization was not in fraud of unsecured creditors at all. It may be that the only people with whom any composition had to be made were the mortgage creditors. This would certainly seem to be so from the fact that the unsecured creditors took no steps whatever to assert their rights.

But granting that the creditors had rights or were wronged, and granting that in a controversy between the creditors and the whole body of stockholders some relief might have been obtained by the creditors, the fact remains that what has been done here is a thing which does not involve the rights of creditors at all. The majority stockholder has made a composition with the mortgage creditors out of which it has secured for itself the whole equity in the reorganized property. The fact that there were unsecured creditors, who are not litigating, and who are not asserting their rights does not in any way affect the equities between the majority shareholder, which abused its power, and secured a benefit for itself against its minority associates, and the latter.

Certainly the majority shareholder could not be

required, by any decree in this case, to turn back its profits to the old company for the purpose of discharging the claims of creditors. Those claims have been long since wiped out by foreclosure, and probably legitimately wiped out. The transfer of property which we seek to bring about is not a transfer from the Southern Pacific Company back to the old company and thence to the minority shareholders, but is a transfer which can be effected by a decree of the court directly from the Southern Pacific Company to the minority shareholders, and all parties interested are in court.

Suppose that the mortgage creditors, finding their suits to foreclose at a stand-still, and desiring to bring about a consent decree, had offered the Southern Pacific Company a payment of $10,000,000 in money, instead of $10,000,000 in stock, to induce the Southern Pacific Company to have the defenses of the old Railway Company withdrawn. Suppose that the Southern Pacific Company had accepted the payment, and had through its power over the old company, and its ownership of a majority of the stock, carried out its bargain and had the defenses withdrawn. Suppose that it should now appear that the Southern Pacific Company held the fund of $10,000,000, and the minority shareholders were claiming that it was money realized through the ownership of the majority of the stock in the old company, and the control of that company, and that they, the minority shareholders, were entitled to share in this fund. Could there be any doubt that in such a litigation the case could proceed to judgment, unembarrassed by the absence of the old company, and without bringing in any creditor of the old company?

The rule as to parties whose presence may be dispensed with under equity rule No. 47 is stated in *Waterman* vs. *Canal Louisiana Bank Company*, 215 U. S., 33, at page 44:

> "The relation of an indispensable party to a suit must be such that no decree can be en-

tered in the case which will do justice between the parties actually before the court without injuriously affecting the rights of such absent party (1 Street's Fed. Equity Prac., 519).

"If the court can do justice to the parties before it without injuring absent persons, it will do so and shape its relief in such a manner as to preserve the rights of the persons not before the court."

An effort is made in the brief of our adversaries to maintain the proposition that in the state court complete jurisdiction by publication could not have been obtained. Cases are cited upholding the well-known rule that service by publication is only good to the extent of property of the absent defendant found or attached within the jurisdiction of the court.

In making this argument our adversaries overlook the fact, that, supposing the old company to be an indispensable party, there would at the end of this litigation be found within the jurisdiction of the court the amount of money or stock which the Southern Pacific Company would be forced to pay to a receiver or to somebody representing the minority shareholders. They overlook the fact that the property which this suit seeks to reach is in the possession of one of the defendants, which has been served with process in this action. They further overlook the fact that in the present suit no claim whatever is made against the old company, and that even on their theory that the money recovered would have to pass through the old company, the suit is one for the benefit of the old company, and not a suit against it. And lastly, they cannot answer our statement made in our main brief, which we reiterate, that it has been flatly decided by the Court of Appeals of New York in a stockholders' suit, indistinguishable in principle from the present one, that service on a foreign corporation

of which the parties are stockholders may be made by publication (*Grant* v. *Cobre Copper Co.*, 193 N. Y., 306, affirming *Grant* v. *Green*, 59 Misc., 1).

The Question of Jurisdiction.

The final decree and the order allowing the appeal, as well as the certificate herein, show clearly that the only question before the Circuit Court, and the only one that the Trial Judge had in mind, was whether or not the Court had jurisdiction. As there is nothing in any other part of the record to contradict this clear statement that the question before the lower court was one of its jurisdiction as a Federal Court, this conclusively shows what the judge below had in his mind—what it was that actuated him in reaching the decision we seek to review. He thought he was deciding a question of jurisdiction, and said he was.

In *Scully* vs. *Bird*, 209 U. S., 481, the Court held that the ground of the action of a Federal Circuit Court in dismissing a bill, as recited in the certificate, will be accepted by the Supreme Court on appeal where a different course requires an assumption of inconsistency between the lower court's opinion and the order of dismissal and certificate. In that case the record was clear, as it is in the case at bar, that the court below dismissed the bill for want of jurisdiction. But from its opinion it was clear that the Trial Judge in that case confused the jurisdiction of the court as a Federal Court with the court as a Court of Equity, as he said in his opinion, as stated by this court at page 484:

> " . . . it is clear that the case of *Arbuckle* vs. *Blackburn*, 113 Fed., 616, *is conclusive against the jurisdiction of a court of equity over the matters set forth in the bill. . . . That case is conclusive that this court has no jurisdiction to entertain a suit of this nature*, and the only order which can be made in this case, notwithstanding the entry of the order *pro confesso*, is one of a dismissal of the bill for want of jurisdiction." (Italics ours.)

This court said at page 485:

> "And it is urged that such was the reason given by the court in its opinion and order dismissing the bill, and that, as the decision of the court was right, it should not be reversed because the reason given for it in the certificate was not the correct reason. *But we cannot assume that there is inconsistency between the opinion and order of the court and its certificate. We, therefore, accept the latter as expressing the ground of the court's action.*" (Italics ours.)

The court then went on to consider the case and reversed the decree dismissing the bill for lack of jurisdiction.

In *Wetmore* vs. *Rymer*, 169 U. S., 115, the court said:

> "These provisions of the several statutes plainly disclose the intent of Congress that a party whose suit has been dismissed by a circuit court for want of jurisdiction shall have the right to have such judgment reviewed by this court. And we have accordingly heretofore held that the action of the circuit courts in such cases is subject to revision."

There can be no question that the case at bar falls directly within these and many other similar authorities.

The Appellees in their brief claim that the court below did not dismiss our bill for lack of the jurisdiction referred to in Section 5 of the Act of March 3rd, 1891, Chapter 517, and many cases are cited to show that this court will only consider such appeals when they involve the jurisdiction of the Circuit Court as a Federal court. This, of course, is so, and there was never any doubt in the court below, either in the minds of counsel or in the mind of the Judge who decided the case, that the only jurisdictional question that was in issue was that of the jurisdiction of the circuit court as a Federal court. The bill was not dismissed for lack of equity or any

of the other reasons given in the cases cited by the Appellees, where this court dismissed the appeals because they did not involve the jurisdiction of the court below as a Federal court.

This court, in case the certificate and other parts of the record are contradictory, can examine the opinion to find out whether the court below dismissed the bill for lack of jurisdiction.

Courtney vs. *Pradt*, 196 U. S., 89.
Loeb vs. *Columbia Township*, 179 U. S., 472.

As we have shown, this hardly seems necessary, as the whole record shows that the appeal is taken to this court, because the question of jurisdiction of the circuit court was involved, and as shown in *Scully* vs. *Bird* (*supra*), even if the opinion contradicted this, it would not be enough to warrant the court in dismissing the appeal, unless the record itself was contradictory.

In this case, however, the opinion shows, as clearly as does the record, that the only question in the mind of the judge below was whether or not the circuit court had jurisdiction as a Federal court. At page 71 of the record the court states in his opinion that:

> ". . . the defendants have moved to dismiss the entire action *upon the ground of lack of jurisdiction*, while the plaintiff has asked that if the court does not retain jurisdiction, the action be now remanded to the State Court . . . It is apparent that the purpose of the various parties is to settle *the question of jurisdiction* and determine the forum (if any) in which this suit can be brought before a discussion of the merits of the case is attempted. . . . And if the *Circuit Court of the United States* for this district *has no jurisdiction*, and if the action be dismissed, a determination of the case upon its merits is plainly unnecessary; while, if the action should be remanded to the State Court a determination upon the merits there should

> not be embarassed by expressions of opinion of this court about what would be its decision if the case was before it." (Italics ours.)

This clearly shows that the only question in the court's mind was, whether the case should be remanded to the State Court or dismissed because the Federal court as a Federal court *had no jurisdiction.* If he were about to dismiss the case for lack of equity or for lack of jurisdiction in the court, simply as a court, he would not consider remanding it.

The court then proceeds to discuss Section 737, R. S., and Equity Rule 47 in order to determine whether or not the circuit court has jurisdiction to proceed with the action under the Federal Statutes as a Federal court, not as a court of equity.

The Court then says at page 75:

> "*It is similar to a motion to dismiss* by a defendant who has appeared specially and removed the case upon the ground that *the service of the parties has not been of such nature as to allow the action to be maintained in the Circuit Court of the United States under the provisions of section 3 of the act.*" (Italics ours.)

This, again, shows that the court below considered and decided this case simply as a question of the jurisdiction of that court as a Federal court, expressly stating that it considered the plea to its jurisdiction similar to a motion to dismiss "upon the ground that the service of the parties has not been of such a nature as to allow the action to be maintained in the Circuit Court," thus indicating, beyond any possibility of dispute, that the case was treated by the court below solely as one of Federal jurisdiction.

After determining that the Railway Company was an indispensable party, the only question discussed in the opinion was whether to remand or dismiss, which would not have been done if the judge

had had in mind merely the jurisdiction of this court as a court of equity, for, of course, if the case was one that could not be entertained by a court of equity and dismissed on that ground, there would be no question of remanding it.

Again at page 79 he says:

> "The question is very similar to that raised in cases where service of the parties has been obtained by methods which will not stand the test of the United States court rules and decisions."

These cases, of course, can involve no question of jurisdiction, except the jurisdiction of the Federal court as a Federal court.

There are no cases cited in the two briefs of the appellees which, in any way, overrule or modify *Scully* vs. *Bird*, or *Wetmore* vs. *Rymer* (*supra*). Mr. McILVAINE, in his brief, at page 4, claims that if it appears from the record that the jurisdiction of the court below is not in issue, that this court should dismiss the appeal, and cites *Fore River Ship Building Co.* vs. *Hagg* to show that this court is not precluded by the statement of the certificate from determining for itself whether the jurisdiction of the court below, as a Federal court, was in issue.

In that case the Circuit Court clearly had jurisdiction of the cause of action and of all the parties in an accident case, and the plaintiff obtained a verdict, whereupon the defendant appealed to the Supreme Court on the ground that the Employers' Liability Act, under which the suit was brought, was penal in its nature, and that the action could not therefore be maintained in this Country by the plaintiff, who was a citizen of Sweden, without proof that Sweden allowed our citizens to bring similar actions in Sweden.

This court held that there was jurisdiction in the Circuit Court, as the plaintiff was a citizen of Sweden, and the defendant a corporation of Massachusetts, and that the court below had jurisdiction

to decide all questions properly before it, "including the one whether, under the applicable principles of law, a court of another sovereignty would enforce a cause based upon the Massachusetts statute," and the determination of that question did not involve the jurisdiction of the Circuit Court as a Federal Court.

It was therefore apparent, from the record in that case, that there could not be any question involving Federal jurisdiction, and the certificate itself shows, on its face, that this was so, for the question certified was, "Whether or not the statute under which the plaintiff's action was brought, was of such a penal character that the Circuit Court did not have jurisdiction of said action". As the Court said, this could not present a question of Federal jurisdiction, whereas, in the case at bar, not only the certificate, but every statement in the record shows that the jurisdiction of the Circuit Court as a Federal court was involved.

The argument and cases cited by Mr. VAN BRUNT on pages 16, 17, 18, 19 and 20 of his brief are not in any way inconsistent with our position.

At page 21 of Mr. VAN BRUNT'S brief the two cases cited under Point III., to the effect that this court is not concluded by the certificate of the court below, but will dismiss the appeal if it appears that the question of the jurisdiction of the court below, as a Federal Court, was not in issue, are not in point. *Nichols Lumber Co.* vs. *Francon* merely holds that the record, as well as the certificate, should show that the question of jurisdiction is involved.

In *Donnell* vs. *Illinois Railroad Co.*, the certificate itself shows that a demurrer had been sustained, and that the plaintiff declined to plead further and that therefore a judgment of dismissal was entered, and as the court said, the only question decided by the demurrer was that the bill "did not state a cause of action." There is, of course, nothing of the sort in the case at bar.

Point IV of Mr. VAN BRUNT'S brief, beginning at page 22, is based on the concession that the court below did have jurisdiction of the case. If this is so, and if the court dismissed it for lack of jurisdiction, of course the decree must be reversed, as the only question to be considered on this appeal is the question of jurisdiction.

The cases cited at page 28 of the same brief do not in any way show that this appeal should be dismissed, as appeals in the cases there cited were dismissed on grounds that do not exist in the case at bar.

At page 31 of Mr. VAN BRUNT'S brief he says that the present case cannot be distinguished from the decision of this court in *Courtney* vs. *Pradt*, 196 U. S., 89. That case is entirely different from the case at bar. There the appeal was from a judgment of the Circuit Court dismissing, for want of jurisdiction *in the State Court*, a cause which had been removed to the Circuit Court from the State Court. No certificate of the question of jurisdiction was applied for or granted, but an appeal was allowed to this court, which was argued together with the motion to dismiss. There was, therefore, no certificate to show just what the grounds were upon which the court below dismissed the case, but it certainly was clear that the dismissal was not upon the ground of lack of jurisdiction of the Circuit Court itself to entertain the suit. The case was therefore not appealable to this court.

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(9083M)

BOGART, AS EXECUTOR OF LAWRENCE, *v.* SOUTHERN PACIFIC COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

No. 165. Argued March 5, 1913.—Decided April 7, 1913.

The question intended to be brought to this court by direct appeal under § 5 of the Circuit Court of Appeals Act is the jurisdiction of the Circuit Court as a Federal court; questions of general jurisdiction applicable as well to state as to Federal tribunals are not included in such review.

The question cannot be brought into the record by certificate if not really presented, and whether so presented or not this court will determine for itself. *Darnell* v. *Illinois Cent. R. R. Co.*, 225 U. S. 243.

Neither § 737, Rev. Stat., nor Equity Rule 47 defines what an indispensable party to an action is, but each simply formulates principles already controlling in courts both state and Federal; a decision dismissing a case removed from the state court because of the absence of an indispensable party rests on the broad principles of general law in that respect, and a direct appeal does not lie under § 5 of the act of 1891.

Where the Circuit Court dismisses a case removed from the state court for want of an indispensable party the question is not one of jurisdiction of the Federal court as such, and this court cannot, in a direct appeal under § 5 of the Circuit Court of Appeals Act, answer a question embodied in a certificate as to whether under such circumstances the case should be remanded to the state court.

THE facts, which involve the jurisdiction of this court of direct appeals under § 5 of the Circuit Court of Appeals Act of 1891, are stated in the opinion.

Mr. H. Snowden Marshall, with whom *Mr. James A. O'Gorman*, *Mr. A. J. Dittenhoefer* and *Mr. David Gerber* were on the brief, for appellants:

As to the jurisdiction of this court on direct appeal: The jurisdiction of the court was in issue in the Circuit Court, so that the appeal was properly taken directly to this court.

In view of the certificate of the court below and the plain facts in the case, it would seem to be unnecessary to argue this question at length.

The court below construed, adversely to its jurisdiction, a Federal statute passed manifestly for the purpose of extending the jurisdiction of the Federal courts. The court also assumed that there existed in the Federal court a jurisdiction to deny a motion to remand and dismiss a case which could be tried in the state court.

The recitals by the court below that the case was decided on jurisdictional grounds should be controlling. *In re Lehigh Mining Co.*, 156 U. S. 322; *Scully* v. *Bird*, 209 U. S. 481.

As the court below decided the cause on the ground of jurisdiction, the appeal was properly taken directly to this court. Section 5, act of March 3, 1891, 26 Stat. 827; *Chicago Board of Trade* v. *Hammond Elevator Co.*, 198 U. S. 424; *Sheppard* v. *Adams*, 168 U. S. 618; *Kendall* v. *San Juan Mining Co.*, 144 U. S. 658; *Nashua Railway Co.* v. *B. & L. Railway*, 136 U. S. 336; see also *Wetmore* v. *Rymer*, 169 U. S. 115.

There was never any doubt in the court below, either in the minds of counsel or in the mind of the judge who decided the case, that the only jurisdictional question that was in issue was that of the jurisdiction of the Circuit Court as a Federal court. The bill was not dismissed for lack of equity or any of the other reasons given in the cases cited by the appellees where this court dismissed the appeals because they did not involve the jurisdiction of the court below as a Federal court.

This court, in case the certificate and other parts of the record are contradictory, can examine the opinion to find out whether the court below dismissed the bill for lack of jurisdiction. *Courtney* v. *Pradt*, 196 U. S. 89; *Loeb* v. *Columbia Township*, 179 U. S. 472.

Mr. Arthur H. Van Brunt for appellees:

On the question of jurisdiction: In appeals or writs of error from the District or Circuit Courts direct to this court under § 5 of the act of March 3, 1891, in cases in which the jurisdiction of the court below is in issue, the only question which can properly be certified to this court is that of the jurisdiction of the court below as a Federal court.

The question of jurisdiction alone can be certified.

In appeals direct from the District and Circuit Courts, under the provision of the statute involved in the present case, only the question of jurisdiction can be considered. *Schunk* v. *Moline &c. Co.*, 147 U. S. 500, 503; *Passavant*

v. *United States*, 148 U. S. 214, 217; *Greeley* v. *Lowe*, 155 U. S. 58, 76; *Mex. Cent. Ry. Co.* v. *Eckman*, 187 U. S. 429, 432; *O'Neal* v. *United States*, 190 U. S. 36; *Venner* v. *G. Nor. Ry. Co.*, 209 U. S. 24, 30, 31; *Scully* v. *Bird*, 209 U. S. 481, 485.

The question of jurisdiction referred to in the act of 1891 is that of the jurisdiction of the District and Circuit Courts as Federal courts and not of their general jurisdiction as judicial tribunals. *Smith* v. *McKay*, 161 U. S. 355; *Blythe* v. *Hinckley*, 173 U. S. 501; *Ill. Cent. R. R. Co.* v. *Adams*, 180 U. S. 28, 34; *Mex. Cent. Ry. Co.* v. *Eckman*, 187 U. S. 429; *Louisville Trust Co.* v. *Knott*, 191 U. S. 225; *Bache* v. *Hunt*, 193 U. S. 523; *Courtney* v. *Pradt*, 196 U. S. 89; *Board of Trade* v. *Hammond Elevator Co.*, 198 U. S. 424; *United States* v. *Larkin*, 208 U. S. 333; *Bien* v. *Robinson*, 208 U. S. 423; *Scully* v. *Bird*, 209 U. S. 481; *Steamship Jefferson*, 215 U. S. 131; *Davis* v. *Cleveland Ry. Co.*, 217 U. S. 157; *Fore River Shipbuilding Co.* v. *Hagg*, 219 U. S. 175; *Darnell* v. *Illinois Central R. R. Co.*, 225 U. S. 243.

Where the necessary elements of Federal jurisdiction exist, the jurisdiction of the court attaches, and an exercise of that jurisdiction, as by a dismissal of the bill, does not involve any question of Federal jurisdiction which can be reviewed by this court under the act of March 3, 1891. Cases *supra* and *Smith* v. *McKay*, 161 U. S. 355; *Blythe* v. *Hinckley*, 173 U. S. 501; *Denver Bank* v. *Klug*, 186 U. S. 202; *Schweer* v. *Brown*, 195 U. S. 171; *Lucius* v. *Cawthon-Coleman Co.*, 196 U. S. 149; *Kansas City &c. R. R. Co.* v. *Zimmerman*, 210 U. S. 336; *United States* v. *Congress Construction Co.*, 222 U. S. 199, 201.

The certificate of the Circuit Court in the present case improperly certifies to this court for decision questions other than that of jurisdiction, and does not certify the question of the jurisdiction of the Circuit Court as a Federal court.

The power to certify other than jurisdictional questions is vested only in the Circuit Courts of Appeal. *Arkansas* v. *Schlierholz*, 179 U. S. 598, 601.

The question of the jurisdiction of the Circuit Court as a Federal court is not certified.

This court is not concluded by the certificate of the court below, but will dismiss the appeal if it appears that the question of the jurisdiction of the court below as a Federal court is not in issue. *Nichols Lumber Co.* v. *Franson*, 203 U. S. 278; *Darnell* v. *Illinois Central R. R. Co.*, 225 U. S. 243.

The jurisdiction of the Circuit Court as a Federal court is not in issue in the present case.

Mr. Tompkins McIlvaine filed a brief for appellee, Metropolitan Trust Company of New York.

MR. JUSTICE DAY delivered the opinion of the court.

This is a direct appeal from a decree of the United States Circuit Court for the Eastern District of New York upon the ground that the jurisdiction of the Circuit Court is in issue under § 5 of the Circuit Court of Appeals Act (March 3, 1891, 26 Stat. 826, c. 517), and a certificate to that effect has been sent to this court.

The suit was originally brought in the New York Supreme Court for the County of Queens by Walter B. Lawrence, who has since died and for whom the appellants have been substituted, against the Southern Pacific Company, Frederick P. Olcott, Central Trust Company of New York, Farmers' Loan & Trust Company, Metropolitan Trust Company of the City of New York, The Houston & Texas Central Railroad Company (which we will call the "Railroad Company") and The Houston & Texas Central Railway Company (which we will call the "Railway Company"). Upon the petition of the

Southern Pacific Company, Olcott and the Railroad Company, the case was removed to the United States Circuit Court. Lawrence alleged in his complaint that he was a stockholder of the Railway Company, of which the Southern Pacific Company owned a majority of the stock; that the Railway Company became involved in various foreclosure suits, to which it set up certain defenses claimed by Lawrence to be valid and sufficient; that the Southern Pacific Company entered into a certain reorganization agreement, whereby, in consideration of the withdrawal of the defenses, which was procured by the Southern Pacific Company, the mortgages were foreclosed and all the property of the Railway Company bought in by defendant Olcott, who transferred the lines of railroad, rolling stock, etc., to the defendant Railroad Company, organized pursuant to the agreement; that new bonds were issued by the Railroad Company to retire the old bonds and the lands of the Railway Company purchased by Olcott were conveyed to the three Trust Companies under the new mortgages, defendants herein, as further security for the bonds; and that under the plan the Southern Pacific was given more favorabie terms than the minority stockholders in the matter of receiving the benefits of the reorganization agreement, and that consequently all the stock of the Railroad Company was taken over by the Southern Pacific Company. Lawrence prayed that the Southern Pacific Company be decreed trustee of all benefits received under the plan and for an accounting, and prayed that the Trust Companies convey the surplus arising from the sale of land, after the bonds have been liquidated, to the Railway Company, and for certain other relief.

After the removal of the case to the Circuit Court, a motion was made to remand to the state court, which was overruled. Thereafter the defendants the Southern Pacific Company, Olcott and the Railroad Company filed

a plea in which it was set up that the Railway Company was a necessary and indispensable party to the suit; that it was beyond the jurisdiction of the court and could not be brought in by process, and without its presence no decree could be rendered in the case, and therefore prayed that the bill be dismissed. Special pleas were filed by the Central Trust Company of New York, the Farmers' Loan & Trust Company and the Metropolitan Trust Company of the City of New York.

Thereafter another motion to remand was made. This motion was based upon the ground that the Circuit Court could not get jurisdiction over the Railway Company, but that the state court from which it was removed could acquire jurisdiction over all the parties. This motion was also denied by the court.

The pleas to the jurisdiction were heard upon an agreed statement of facts, from which it appears that the Railway Company was incorporated under a special act of the State of Texas, which contained no limitation upon its corporate existence, and prior to 1885 had operated certain railroads in Texas; that the Railway Company's property was sold under the foreclosure decree for seven million dollars less than the amount decreed to be due and that the deficit was unpaid and uncollectible; that the reorganization had been accomplished; that since the foreclosure sale the Railway Company has owned no property and has had no place of business in the State of New York; that no meeting of the stockholders or directors has been held since 1890, and that while there are three surviving directors, none of them visit the State of New York upon the company's business. The Circuit Court held that the Railway Company was an indispensable party to the suit and, unless it could be served with process within five days from the date of entering the order, a final decree should be entered dismissing the bill, which was thereafter done.

The Circuit Court made a certificate upon which to bring the case here containing the following questions:

"1. Whether the Circuit Court had jurisdiction to proceed with the cause, and whether the Circuit Court had jurisdiction of the cause of action.

"2. Whether the Houston & Texas Central Railway Company was an indispensable party to the action.

"3. Whether if the Houston & Texas Central Railway Company was an indispensable party to the action and would not appear therein and could not be served with process within the jurisdiction of the court, the court thereby lost jurisdiction of the cause of action so that it should dismiss the bill.

"4. Whether if the Houston & Texas Central Railway Company was an indispensable party and would not appear and could not be served with process within the jurisdiction of this court, the cause should have been remanded to the State court, from whence it was removed."

Appeals may be taken directly to this court from the Circuit Court under § 5 of the Circuit Court of Appeals Act in any case in which the jurisdiction of the Circuit Court is in issue, and it is provided that in such cases the question of jurisdiction alone shall be certified to this court for decision. The question intended to be thus brought to this court by direct appeal is well settled to be the jurisdiction of the court as a Federal court. Questions of general jurisdiction applicable as well to state as Federal tribunals are not included in such review. *Louisville Trust Co.* v. *Knott*, 191 U. S. 225; *Courtney* v. *Pradt*, 196 U. S. 89; *Fore River Shipbuilding Co.* v. *Hagg*, 219 U. S. 175.

The question cannot be brought into the record by certificate if not really presented, and whether so presented this court will determine for itself. *Darnell* v. *Illinois Central R. R. Co.*, 225 U. S. 243.

The question to be decided is whether the case was dis-

missed for the want of jurisdiction in the Circuit Court as a Federal court, for if it be found that the case was dismissed because of the decision of a question not peculiar to the Federal jurisdiction and involving only a general question of procedure in equity, this court need not consider it. From what has been stated it is apparent that the case was duly removed because of diverse citizenship, and what was done afterwards was in pursuance of the jurisdiction thus acquired. The defendants, the Southern Pacific Company, Olcott and the Railroad Company, by plea claimed that the cause should not proceed because the Railway Company was an indispensable party to the suit. This, it is contended, presented a question of the jurisdiction of the court as a Federal court, and the dismissal of the suit was the denial of such jurisdiction.

Section 737 of the Revised Statutes provides:

"When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."

Equity Rule 47 (210 U. S. 508, 523) is to the same effect:

"In all cases where it shall appear to the court that persons, who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the

parties before the court, the court may, in their discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."

While the statute and rule just quoted, to the extent to which they go, are, of course, controlling, neither the rule nor the statute undertakes to define what is an indispensable party, but each merely undertakes to formulate principles already controlling in courts of equity and applicable as well to other courts as to those of Federal origin. The statute was originally passed February 28, 1839, c. 33, 5 Stat. 321, and Rule 47 of equity practice as adopted by this court is only a declaration of the effect of the act of Congress. The statute and rule came before this court in *Shields* v. *Barrow*, 17 How. 130, and, speaking of them, Mr. Justice Curtis, delivering the opinion of the court, said (p. 141):

"The act says it shall be lawful for the court to entertain jurisdiction; but, as is observed by this court in *Mallow* v. *Hinde*, 12 Wheat. 198, when speaking of a case where an indispensable party was not before the court, 'we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court.'

"So that, while this act removed any difficulty as to jurisdiction, between competent parties, regularly served with process, it does not attempt to displace that principle of jurisprudence on which the court rested the case last mentioned. And the 47th rule is only a declaration, for the government of practitioners and courts, of the effect of this act of congress, and of the previous decisions of the court, on the subject of that rule. *Hagan* v. *Walker*, 14

How. 36. It remains true, notwithstanding the act of congress and the 47th rule, that a circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot be done between the parties to the suit without affecting those rights. To use the language of this court in *Elmendorf* v. *Taylor*, 10 Wheat. 167: 'If the case may be completely decided, as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the court cannot reach,—as if such party be a resident of another State,—ought not to prevent a decree upon its merits.' But if the case cannot be thus completely decided, the court should make no decree."

In other words, it was declared by this court that the rule as to indispensable parties, without which the court could not proceed to a decree, is equally applicable to all courts of equity, whatever may be their structure as to jurisdiction, and rests upon the broad principle that no court can adjudicate directly upon a person's rights unless such person is actually or constructively before the court.

What the court really did in the present case was, first to entertain jurisdiction of the suit upon the removal, and then, applying the general principle that a suit cannot be proceeded with in the absence of an indispensable party, to dismiss it because the Railway Company was an indispensable party to the present suit and had not been served and had not appeared or waived service, as would have been the requirement in any court of equity reaching the same conclusion.

Nor does the decision embodied in the fourth paragraph of the certificate and shown in the decision of the court make a question of jurisdiction of the court as a Federal court. As therein embraced the decision was that the cause should be dismissed for want of jurisdiction and not

that it should be remanded to the state court. This decision was to the effect that the court, having reached the conclusion, in the exercise of jurisdiction, that an indispensable party was not upon the record, ordered a dismissal of the action. This did not involve a decision of the jurisdiction of the court as a Federal tribunal.

We therefore are of the opinion that in no aspect in which the jurisdictional question was presented to this court is it reviewable by a direct appeal to this court from the Circuit Court.

The present appeal is therefore dismissed.

EITOR v. CITY OF TACOMA